

VOL. I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-vs-

10-CR-219S

TONAWANDA COKE CORPORATION
MARK L. KAMHOLZ,

Defendants.

Proceedings held before the

Honorable William M. Skretny, U.S.

Courthouse, 2 Niagara Circle, Buffalo,

New York on February 27, 2013.

APPEARANCES:

AARON J. MANGO,
Assistant United States Attorney,
ROCKY PAIGGIONE, Senior Counsel,
U.S. Department of Justice,
Appearing for the United States.

GREGORY F. LINSIN, ESQ.,
JEANNE M. GRASSO, ESQ.,
ARIEL S. GLASNER, ESQ.,
Appearing for Tonawanda Coke Corporation.

RODNEY PERSONIUS, ESQ.,
Appearing for Mark L. Kamholz.

Also Present: Lauren DiFillipo, Paralegal
Sheila Henderson, Paralegal

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1 I N D E X

2 OPENING STATEMENTS PAGE

3 Mr. Mango 33

4 Mr. Linsin 50

5 Mr. Personius 79

6 ALFRED CARLACCI

7 Direct Examination by Mr. Mango 104

8

9

10 GOVERNMENT EXHIBITS EVD.

11 105.07 164

12 305.07 165

13 105.42 166

14 305.42 166

15 128 176

16 19.01 186

17 19.02 189

18 19.03 191

19 19.04 193

20 129 195

21 110 199

22 19.17 201

23 19.21 203

24 19.05 204

25 19.06 206

1 (Jury not present in the courtroom.)

2 THE CLERK: Criminal case 10-219S, United
3 States of America versus Tonawanda Coke Corporation
4 and Mark L. Kamholz.

5 THE COURT: Good morning, everybody.

6 MR. MANGO: Good morning, your Honor.

7 MR. LINSIN: Good morning, your Honor.

8 THE COURT: We start out by giving
9 Mr. Glasner a gold star for an early arrival. All
10 right. And then we post those as we go through the
11 trial weeks.

12 MR. GLASNER: Thank you, your Honor.

13 THE COURT: You're welcome. From the
14 government's standpoint, if you let me know who the
15 paralegal bodies will be, or the tech bodies will
16 be so we can introduce those to the Court - to the
17 jury. I'll probably have you do that.

18 But I know Mr. Bauman is here and Miss Turton,
19 and Miss DiFillipo, whom the jury heard about
20 yesterday, but she was visibly absent.

21 MR. MANGO: Yes.

22 THE COURT: Okay. So we'll make that all
23 straight.

24 MR. MANGO: Yes, your Honor. Special
25 Agent Conway will also be with us, who you met

1 yesterday.

2 THE COURT: He's there. He's working, and
3 then we still have somebody else there hiding.

4 Good morning.

5 MS. DUBRELL: Good morning. Laurie
6 Dubrell, attorney from EPA.

7 THE COURT: Are you going to be seated
8 somewhere in here? Or back in the gallery?

9 MS. DUBRELL: Yes, your Honor.

10 THE COURT: Okay. No unfamiliar faces
11 here for the defense today. But we have some good
12 news and some bad news. I guess if there's
13 anything you want to talk about first, we can do
14 that.

15 MR. LINSIN: Nothing on behalf of
16 Tonawanda Coke, your Honor.

17 THE COURT: Okay. All right. There is an
18 article in today's paper relative to Tonawanda's
19 meeting last night. You know, frankly, I don't
20 think there's anything in there that we need to
21 address. It's consistent with all the admonitions
22 to exercise the caveat to stay away, but it doesn't
23 reference anything here. So I think we're okay
24 with that.

25 We did get a call this morning from juror

1 number seven, Mrs. Nicole Fuller. And if your
2 sense is the same as mine, that's no big surprise.
3 I mean, in my view, she was not particularly happy
4 to be included on the jury yesterday. I listened
5 to her audio message on the chamber's telephone
6 this morning. She claims that she has the flu,
7 which appeared over the evening. I don't know what
8 we can do about it. She is the only juror that's
9 missing. I'm going to suggest that we move up
10 alternate number one, Mr. Bauman, to take over her
11 position.

12 I am going to have her come in. I'm not going
13 to let up on it until she recovers and hopefully
14 that won't occasion another set back. But, I will
15 tell the jury that she claims to be ill. And, you
16 know, I'm going to appreciate the fact and note
17 that -- that Mrs. Palistrant has made it. And I
18 hope they get the connection, because I'm trying to
19 be subtle but not so subtle, unless anybody
20 disagrees with that approach. I want everybody to
21 know it's going to take a little bit of sacrifice
22 here to continue on. Are we okay with that?

23 MR. PIAGGIONE: Yes, your Honor.

24 MR. LINSIN: Your Honor, I believe I'm
25 okay. I just want to make sure what the Court's --

1 your intention would be eventually to release
2 Miss Fuller when she does come in, but to proceed
3 this morning by moving up alternate number one to
4 the number seven spot?

5 THE COURT: Right, I am. And then when
6 she does come in -- I'm not going to give up on it.
7 There must be a recovery point in time. Then I'm
8 going to let her know that she must appear at the
9 next jury selection. Has nothing to do with this
10 case, but that her service has not been concluded.
11 You know, I'm hoping that, you know, there's
12 nothing seriously amiss as far as her health is
13 concerned. But, you know, I think from a morale
14 standpoint, you know, it's important that we
15 continue to press on.

16 And, you know, again, I think everybody is
17 aware in the jury that Miss Palistrant is not the
18 happiest of jurors, but that we do appreciate her
19 service. So, I think we'll go from there, and
20 we'll let the issue drop, and we'll continue to
21 move forward day by day.

22 MR. LINSIN: That is certainly acceptable
23 to Tonawanda, your Honor.

24 THE COURT: Okay. How about you,
25 Mr. Personius?

1 MR. PERSONIUS: It is, Judge. Thank you
2 for asking.

3 THE COURT: Okay.

4 MR. MANGO: Acceptable, your Honor.

5 THE COURT: Mr. Mango?

6 MR. MANGO: Yes, of course.

7 THE COURT: Okay. All right. I guess
8 we're all ready then to go forward. You want to
9 bring the jury in at 9:45, okay? It's about four
10 minutes so we can kind of shuffle around and get
11 everything together. I have a preliminary charge,
12 very brief. We'll address the juror issue, and
13 then we should be ready for opening statements,
14 okay?

15 MR. MANGO: Yes, your Honor. We do
16 have -- I informed Miss Labuzzetta we do have a
17 stipulation to enter following openings before the
18 first witness. Would it be the Court's
19 intention -- or maybe the government would ask to
20 take a brief recess after opening just to make sure
21 we're ready to proceed smoothly into the next
22 witness?

23 THE COURT: Yeah. Who is I going to give
24 the opening?

25 MR. MANGO: I am.

1 THE COURT: Approximately how long?

2 MR. MANGO: Approximately maybe 25, 30
3 minutes.

4 THE COURT: Mr. Linsin?

5 MR. LINSIN: Same range, your Honor.

6 THE COURT: On behalf of Tonawanda.

7 Mr. Personius?

8 MR. PERSONIUS: About the same, Judge.
9 When I tried it it was about 20.

10 THE COURT: Okay. So it would be
11 appropriate I think to take a break before we get
12 started. Okay. Sounds good. Three or four
13 minutes we should be ready. Thank you.

14 (Short recess was taken.)

15 (Jury seated.)

16 THE COURT: Good morning, ladies and
17 gentlemen. Please have a seat.

18 Okay. Miss Labuzzetta, if you would call the
19 case, please. We have a few matters of business to
20 address and we'll get started with the trial.

21 THE CLERK: Criminal case 10-219S, United
22 States of America versus Tonawanda Coke Corporation
23 and Mark L. Kamholz.

24 THE COURT: Okay. We're probably going to
25 do some introductions in just a minute or two,

1 ladies and gentlemen, but it's good to see you all
2 here except for one missing juror I see. And just
3 for your information, I did get a call early this
4 morning -- and we've been discussing this and we've
5 been assembled here for a while, so I apologize for
6 the little bit of delay in getting you started.
7 But thank you for being here promptly. We
8 appreciate that. That will help us all.

9 My chambers and I, we did receive a call from
10 Nicole Fuller, and she advised us that she
11 contracted the flu overnight, and so she'll be
12 unavailable. We are going to start the trial
13 promptly. And I've talked to the attorneys, and we
14 talked about that utility role, so we're going
15 to promote one of our alternates.

16 And Mr. Steven Bauman, you graduate from
17 alternate number one to our regular juror number
18 seven. So if you wouldn't mind moving up, we'll
19 put you there.

20 Okay. And when Miss Fuller does recover, I'm
21 going to have her brought in, and I will talk with
22 her. She'll not be a part of this jury, but she'll
23 be assigned to the next jury selection pool, which
24 will involve one of the judges in this particular
25 building. And then that will be the start of the

1 fulfillment of her continued jury service. Okay.

2 Mr. Bauman, you're okay sitting as a regular
3 juror?

4 A JUROR: Yes.

5 THE COURT: Okay. And then our alternates
6 get promoted as well. And, Miss Malyszka, you
7 become alternate number one; and, Mr. Carlson, you
8 become alternate number two; and Mr. Demmer, you
9 become alternate number three. And you can play
10 with those seats up there if you want to get more
11 comfortable one way or another and occupy that last
12 seat, that's okay. It's probably better that you
13 stay where you are, and we can use that as a
14 utility, or we'll have a phantom alternate number
15 four, a person that we'll invite into the courtroom
16 from time to time.

17 Okay. All right. We've got serious business
18 to conduct. And I think, as you can see, all the
19 attorneys and parties, they're ready. You are
20 ready, I can see that. And we have to technically
21 start the case. And even though we selected you
22 yesterday, the official start of the trial doesn't
23 happen until you are sworn in as jurors. Once you
24 are sworn in, the trial is officially started, so
25 I'm going to ask you, now that you look so darn

1 comfortable, to stand up, please, and we're going
2 to have you sworn in this morning.

3 (Jury oath administered.)

4 THE COURT: Okay, well done. And we're
5 going to step number two. You might see a few
6 extra bodies here in the well area of the
7 courtroom. You're going to get familiar, I think,
8 with the faces and the names, and I don't know
9 everybody yet. So I kind of do this to help me. I
10 think you should know -- even though I have
11 instructed you that the personalities have no role
12 in what the ultimate outcome of this case will be.
13 Whether you like everybody or not, or some or not
14 doesn't matter. What they say, what I say, none of
15 that is evidence. What they do, not evidence. You
16 have to decide this case on the basis of competent
17 evidence or lack thereof.

18 Government has the burden beyond a reasonable
19 doubt on each essential element of each crime
20 separately considered. Nineteen counts in the
21 indictment involving the two defendants in this
22 case.

23 I'm going to do some introductions. If I
24 falter a little bit, please bear with me. I only
25 get worse as the trial goes on. I'll try as

1 strongly as I possibly can to go forward this
2 morning. And, you know, the new faces -- I mean, I
3 know the names, but I may have Mr. Mango introduce
4 them. But let me make sure that you're comfortable
5 with who's sitting at counsel table for the
6 government, that's Aaron Mango in the dazzling
7 striped pink tie. And followed by Rocky Piaggione.
8 And let's see. We also have Robert Conway, and
9 he's the special agent from EPA. And I think I get
10 this right -- you can correct me, Mr. Mango. We
11 have in the center of that triumvirate at the far
12 table is Kathleen Turton.

13 THE PARALEGAL: Morning.

14 THE COURT: She's a tech specialist. I
15 don't think she's going to be here for the whole
16 trial, but in and out probably. You heard the
17 person at the far right is Lauren DiFillipo. And
18 also Craig Bauman. They're all the tech people
19 that will be assisting the government in its
20 presentation of the evidence as I understand it.

21 And then we'll go from there. I think they're
22 all familiar faces on the defense side. And we
23 have Mr. Gregory Linsin and Jean Grasso, okay, and
24 they both represent the defendant corporation
25 Tonawanda Coke, along with Arial Glasner who is at

1 the far table. You met the defense paralegal, and
2 that's Sheila Henderson. And representing the
3 corporation -- and remember we said that the
4 corporation -- can't bring a corporation in, so its
5 president Paul Saffrin is present.

6 At the far table representing Mark L.
7 Kamholz -- you may identify yourself I guess. He's
8 the individual defendant in the indictment. And
9 he's represented by Rodney Personius.

10 Okay. And you know Michelle and Mary, my
11 courtroom deputy, and the distinguished hairless
12 gentleman over there is Andrew Moeller. He's my
13 law clerk and he works with me. He'll be in and
14 out during the course of trial. I think that's
15 everybody. And, you know, we'll be seeing a lot of
16 each other in the next four weeks or so.

17 And, you know, you've been terrific so far. We
18 had a long day yesterday. Everyday I hope will be
19 a long day, but I hope it will go speedily. And I
20 hope we accomplish a lot each day so that we do get
21 this trial done in a way that's absolutely
22 ultimately fair to both sides.

23 And I'm going to repeat a little bit of what I
24 discussed with you yesterday, because I think they
25 just -- it just establishes the groundwork, the

1 fundamentals for going forward. And I hope this
2 helps you a little bit, because it's osmosis by
3 repetition I think.

4 I'm going to be using terms that really mean
5 the same during the course of the trial, but
6 they're not exactly identical. For example, you
7 know, you might hear me refer to the gentlemen,
8 lady here that are the legal people as attorneys or
9 lawyers, means the same thing, or counsel
10 sometimes. And, you know, no real distinction
11 amongst those three terms.

12 I'm sometimes referred to as the judge, the
13 Court, no real difference.

14 The prosecution, prosecutors, the government,
15 the United States, that all means the same
16 basically.

17 The defendants, you know, that relates to
18 Tonawanda Coke Corporation and Mr. Kamholz, so no
19 distinction there except you have to consider each
20 separately and distinctly on the elements and the
21 charges, and each has separate representation.
22 Collectively I think the two are defendants or
23 individually a defendant.

24 You'll hear objections -- that's a part of the
25 job of the attorneys -- in all likelihood. I've

1 yet to have an objection-free trial. And, you
2 know, I will resolve the objections. If I sustain
3 an objection, that means that the party making the
4 objection is correct in my view. If the objection
5 is overruled, that means that that person is not so
6 correct, if you will. And then I'll try to explain
7 to give you some direction after a ruling, where
8 it's appropriate. Otherwise we'll just move on.
9 The attorneys are comfortable with being sustained
10 or being overruled. That's part of what they're
11 acclimated with.

12 Whether I make an objection -- I mean, don't
13 keep score. None of that is important. I mean,
14 attorneys will make those objections in good faith.
15 If they don't, I'll let them know. And I'll let
16 you know at times. But the bottom line is, you
17 know, we -- the rules are strict. The evidence
18 that should be considered should be the competent
19 evidence.

20 And it -- you know, it's what we tell everybody
21 that comes into this courthouse, we play by the
22 rules. And the rules get a little complicated, but
23 they are very, very helpful. And so I will apply
24 them as best as I can. The competent evidence
25 comes when it's what we call received into evidence

1 by me. Okay. And you're going get that at the end
2 of the case. When you go into your deliberations,
3 you get all of the exhibits in some fashion that
4 have been received into evidence.

5 Now, you may hear testimony about exhibits that
6 don't wind up being admitted into evidence, and
7 that's okay. That's proper. But you are to
8 consider the testimony, not the exhibit. You won't
9 get the exhibit necessarily. And, you know, if
10 that becomes in any way confusing, I'll try to
11 clear it up as we go through the course of the
12 trial.

13 To get to a unanimous verdict, and recall --
14 I'm going to emphasize this many times. Everything
15 comes to you in the four walls -- within the four
16 walls of this particular courtroom. What do you
17 apply from the outside? Only your common sense,
18 experience, and intelligence. You work with that.
19 You'll get to a unanimous verdict. Your verdict
20 must be unanimous. You're going to be in the best
21 position of anybody ever to be able to decide the
22 disputes here in this particular case.

23 You have to be respectful of each other, listen
24 to each other. And we're going to give you
25 notebooks, stenographer books, so you can take

1 notes if you choose to do that. And, you know, the
2 one caveat on that, you know, train yourself to
3 absorb as much as you possibly can. Don't be
4 distracted by note taking if you can possibly avoid
5 that. But sometimes note taking helps. We're not
6 going to let you take the notebooks home with you.
7 We confiscate them before you leave. You get them
8 back the following day.

9 You are the deciders of the facts, all right?
10 You are the judges of the facts. You are the
11 determiners of credibility, the believability of
12 the witnesses. All of the witnesses start as
13 equals at the bar of justice. And those aren't
14 just idle words. That's what makes the system
15 work. So you take a look at these witnesses, look
16 at what their interest in the case may be. How do
17 they communicate to you? What can they recall?

18 This case goes back, I guess, back to 2005 in
19 terms of references in the indictment. So that's a
20 long time. And you take that into account in terms
21 of recollections. That's your choice to make. You
22 have to determine what the facts are. And there
23 will be disputes in terms of what those facts are
24 in this particular case. You decide the fact
25 issues. You are the judges of the facts.

1 Okay. I'll take care of the law, all right?

2 That's my job. I'm the judge of the law. I
3 resolve the objections. I give you that final
4 instruction at the end of the case just when, you
5 know, and it's going to wrap things up. You're
6 going to get closing arguments from the attorneys.
7 They will be different from the opening statements.
8 But the similarity is that neither one of those are
9 evidence, because the only evidence comes from the
10 testimony of the witnesses, their answers. Not the
11 questions, because sometimes the questions assume
12 facts that are not in evidence.

13 So, the rule is, the law is, that the answers,
14 against the backdrop of the question, that's the
15 evidence that you can consider. Okay. Only that.
16 The answers of the witnesses, the exhibits received
17 into evidence, any stipulations -- and the case
18 will be opened after opening statements by a
19 stipulation, an agreement amongst the parties as to
20 what the evidence is that is competent for you to
21 consider, and anything that I might judicially
22 notice. What does that mean? It means I tell you
23 that something is indisputable. It's usually
24 relating to sometimes noting legal matters or the
25 law or certain matters in terms of, for example,

1 locations of things, can be almost anything that is
2 undisputed at least from the judicial and parties'
3 perspective. So I'll tell you that. I'll tell you
4 when I'm judicially noting it, but it does amount
5 to what you can consider to be competent evidence.

6 The indictment in this case, 19 counts. Two
7 defendants in each of the 19 counts. Both
8 defendants presumed innocent. Government, burden
9 of proof beyond a reasonable doubt on all of those
10 counts. The defense, each defendant separately to
11 each count has entered a plea of not guilty. Okay.
12 All right.

13 At the end of the case that's when you should
14 examine whether the government has proven its case
15 beyond a reasonable doubt on each essential element
16 of the crime charged. And I say it that way
17 because you're not to make up your mind until all
18 of the evidence is in. Until that point in time
19 comes, if it does, each defendant, the corporation
20 and Mr. Kamholz, are presumed innocent, and that
21 never changes until you are satisfied unanimously
22 that a defendant or both defendants are proven
23 guilty by the government's proof beyond a
24 reasonable doubt.

25 The opening statements -- the way it works is

1 because, you know, the attorneys for the
2 government -- they get that table closest to you.
3 That's the way the process has evolved. All right.
4 That's not because their case is entitled to
5 anything more or less than the defense case.
6 That's the protocol that we follow.

7 Because the government, though, is bringing the
8 case, it gets the opportunity to open first. And
9 the closing arguments, it gets the opportunity to
10 close first. Okay. So, that's tied into the fact
11 that it's bringing this action against the two
12 defendants.

13 What is said, what you will hear today, that's
14 just to give you a roadmap about what this case is
15 about. You've heard a little bit about it. But
16 the attorney's job is to embellish that a little
17 bit, so that you will be in a position to know what
18 to expect in this case from the evidence or the
19 lack of evidence.

20 We proceed in two stages. There's the
21 prosecutors' case, there is the defense case if
22 they choose to put one on. But there will be
23 questioning by all of the attorneys irregardless of
24 whose case we're talking about, the defense case or
25 the prosecutors' case.

1 All right. If it's appropriate, you know, I'm
2 going to tell you from time to time how you are to
3 consider certain evidence. It may be for a
4 specific purpose as opposed to the ultimate issue
5 in the case, and I may tell you that certain things
6 that you can consider in whole or in part or not at
7 all, depending on what's before you. So we'll get
8 into that a little bit. But I'll try to make it as
9 easy for you as I can.

10 Remember, all these terms, maybe you are more
11 familiar with them than I am, I don't know. But
12 we're learning about this case together, because I
13 don't know what the evidence is in this case. What
14 I know is what we had to go through to get it trial
15 ready. But in terms of the evidence, I will be
16 hearing it for the first time, as you will be, and
17 we'll have to get our familiarity with most of the
18 terminology together.

19 Then, you know, we'll have certain breaks. You
20 go back to your deliberation room. That's your new
21 home for the next month or so. And then that's
22 where you will make the final deliberation that
23 leads to your unanimous verdict in this case. And
24 again, we ask you to keep your minds open, and be
25 respectful. And I ask the attorneys to do that as

1 well.

2 If I ask questions during the course of trial,
3 which I usually do, it's because either I think it
4 will help you or maybe in my own mind I'm a little
5 bit confused, so I want to make sure I put myself
6 in a position and you in a position to do the best
7 job possible. But it's not evidence. It's not an
8 indicator of how I feel about the case, who's right
9 or wrong or whatever. I have no role in that. You
10 have to decide that. Okay. And please keep in
11 mind what I'm trying to do is clarify and simplify,
12 and nothing more than that.

13 In this case, there will be a number of what we
14 call expert witnesses, what I anticipate from the
15 information I've been given from the attorneys for
16 both sides. You will know who the expert witnesses
17 are so to speak. By the way, you view them like
18 any other witness. There's no witness gets special
19 treatment.

20 An expert witness does by way of training,
21 expertise, education, or whatever, in all
22 likelihood have information tied into his or her
23 expertise that can be of assistance to you to get
24 to the resolve of the issues. That's why we bring
25 experts in. But their credibility, you determine

1 it the same way using the same criteria that you do
2 with all the other witnesses. That's what makes
3 the system so fair.

4 It's not a usual practice to ask questions by
5 jurors. I'm going to allow it in this case with
6 respect to expert witnesses. But there's a
7 procedure that has to be followed. The question
8 right will be only as to expert witnesses, because
9 some of the stuff is pretty technical. At the back
10 of your notebooks will be a question form. And the
11 way it works is you write out your question. I'll
12 take the question. I'll see if it's proper under
13 the rules that apply, and I'll discuss it with the
14 lawyers. And then if it's copacetic, if it's okay,
15 then I'll have the question asked on your behalf.
16 I'll do the questioning of the witness based on
17 what you've given to me.

18 My suggestion is be discerning in the questions
19 if you choose to ask a question in that fashion
20 through a written communication that I get. You
21 know, if it's something that's really troubling,
22 and you think, gee, if somebody just asked this,
23 everything would come together for me, then you're
24 perfectly free.

25 I may not be able, because of the rules, to ask

1 the question you asked me to ask. But I'll give it
2 the best effort that we can to make it more
3 understandable for you, again, as best we can. So
4 that will be the process that we're going to use as
5 far as questions are concerned. And then I will
6 try to remember and ask everybody here to remind me
7 that before the witness concludes to give you that
8 opportunity to write your question if you're not
9 satisfied from the examination. And usually
10 examinations are pretty thorough. But they may
11 just miss a question or two that would be helpful
12 to you.

13 Again, I'm going to try to limit the number of
14 side bars that we have. And that's where the
15 attorneys come up here to the bench, and we talk on
16 this microphone. You listen to white noise, no
17 longer Chopin, but we will I work on that somewhere
18 down the line a little bit. And I'll get the
19 administrative matters resolved as best I can, so
20 we don't encumber and burden you.

21 And remember that the attorneys are not --
22 they're instructed not to discuss matters with you.
23 If they bump into you on the elevators or whatever,
24 good morning, good afternoon is about all you're
25 going to get. That's by my direction, just so that

1 we don't run into complications or problems and
2 appearances and the like, okay?

3 Everybody with me so far? All right. Let me
4 tell you a little bit though very, very briefly.
5 You're going to hear more about this from the
6 lawyers. And, you know, I want tell you about the
7 indictment. You already know that there are 19
8 counts. And I want to just tell you a little bit
9 about the elements, because I want you to focus on
10 those. This is elementally driven. The government
11 has to prove each element beyond a reasonable
12 doubt.

13 And Counts 1 through 15 in the indictment have
14 essentially the same essential elements. And for
15 those counts there are four essential elements.
16 And I'll just give you a couple of points of
17 reference as we talk about these in the aggregate.
18 But here are the four elements. First, that the
19 defendant was an owner or operator of a stationary
20 source of air pollutants, and the indictment, which
21 you will see at the end of the case, refers to that
22 stationary source as Tonawanda Coke Corporation.

23 The second element, that the stationary source
24 of air pollutants, Tonawanda Coke, was subject to
25 the Title V operating permits program. Okay.

1 You'll learn what that means.

2 Third, that during the time periods alleged in
3 the indictment -- and we're covering a span roughly
4 from 2005 through 2009 in that aggregate of 15
5 counts -- the defendant, Tonawanda Coke -- this is
6 the third element that has to be proven beyond a
7 reasonable doubt -- operated or caused to be
8 operated an emission source in violation of a
9 Title V operating permit requirement. Now, what
10 does that mean?

11 Okay. Counts 1 through 5 talk about a
12 pressure-relief valve in the by-products department
13 of TCC, Tonawanda Coke Corporation, that's the
14 emission source. Counts 6 through 10 talk about a
15 western quench tower without a baffle system.

16 Okay. So, I mean, terminology that we made
17 reference to very briefly yesterday. But that's
18 the difference in Counts 6 through 10. Government
19 has to prove that that caused an emission, all
20 right, that violated the permit requirement.

21 And Counts 11 through 15 reference an eastern
22 quench tower without baffle system, that the
23 emission violates the operating permit requirement.
24 So that's where we're at as far as those four
25 elements -- or those are the first three. The

1 fourth element is that the defendant named in those
2 counts acted knowingly. The government has to
3 prove that beyond a reasonable doubt. Defendants
4 both are presumed innocent until you find the proof
5 satisfies you, if it does, beyond a reasonable
6 doubt.

7 Count 16 doesn't have four elements. It has
8 three. You have to separately consider it. That's
9 the obstruction of justice charge in the
10 indictment. The government has to prove each
11 element, though, beyond a reasonable doubt. And
12 the first element is that on or about the date set
13 forth in the indictment. And this -- for Count 16
14 it's roughly the month of April, 2009, a proceeding
15 was pending before an agency of the United States.
16 Okay. You'll find out on that.

17 Second, that the defendant knew that a
18 proceeding was pending before an agency of the
19 United States; and third, that the defendant
20 corruptly endeavored to influence, obstruct, or
21 impede the due and proper administration of the law
22 under which the proceeding was being conducted.
23 Those are the three essential elements.
24 Obstruction of justice. Did something to interfere
25 with the proper administration of justice under the

1 facts and circumstances of this case.

2 Then we have the final Counts 17, 18, and 19.
3 Count 17 relates to a period of May of 1998 through
4 December of '09 -- is that 2008, or is that --

5 MR. MANGO: 2009, your Honor.

6 THE COURT: It's 2009. But is it 1998
7 or 2008? I copied it down --

8 MR. MANGO: It's 1998, your Honor.

9 THE COURT: Okay. Thank you. Count 17,
10 May of 1998 through the period December of 2009.
11 And Count 18 covers the period June through
12 September of 2009. And Count 19 covers the period
13 June of 2007 through October of 2009.

14 I know this is a lot, but you've got to look at
15 it. Those are the things you focus on, the time
16 periods, the elements. And you will have a paper
17 framework to work for. But I just want you to know
18 that that's the way these counts are broken down.

19 The first element that relates to the
20 government's burden of proof beyond a reasonable
21 doubt on Counts 17 through 19 are that the
22 defendant knowingly stored or disposed of, or
23 caused others to store or dispose of a waste
24 product -- in this case benzene is referred to --
25 on or about the dates set forth in the indictment.

1 I gave you those dates.

2 Second of the four essential elements for these
3 counts are as follows: That the waste was
4 hazardous as defined by a particular federal
5 environmental law referred to commonly as RCRA,
6 which means Resource Conservation and Recovery Act,
7 RCRA;

8 Third, that the defendant knew the hazardous
9 waste -- we're talking about benzene here -- had
10 the potential to harm others or the environment.
11 In other words, knew that the waste was not
12 harmless substance like uncontaminated water; and
13 fourth, that the defendant did not have a permit to
14 store or dispose of that hazardous waste.

15 Okay. So we have for each cluster of counts
16 essential elements. They're all relatively
17 different. But you have to consider the proper
18 counts with the proper elements. And the
19 government has to prove each, because they're all
20 essential on your separate consideration beyond a
21 reasonable doubt.

22 Okay. I mentioned to you the case will start
23 after the opening statements with a stipulation.
24 And that's an agreement with respect to the fact
25 that something is competent evidence that you may

1 choose to consider in reaching your what?

2 Unanimous verdict in this case.

3 What do you apply in this regard? Common
4 sense, experience, intelligence. Just work with
5 that. Just let it resonate, because that's what's
6 going to be make all of that happen in terms of you
7 getting to this final disposition in this case.

8 Okay. And I want to just repeat one last time.
9 No outside contact, all right. Don't go to
10 dictionaries, reference materials, Web sites,
11 blogs. Don't use electronic tools of any kind to
12 obtain information about this case that you feel is
13 not being presented to you or just out of
14 curiosity. Only what you get here is what you are
15 to use in arriving at your unanimous verdict.

16 All right. No investigation on your own.
17 Don't go visiting the site. Don't do anything like
18 that. Don't discuss this case with anybody. We
19 talked about that pretty extensively yesterday.
20 You really shouldn't talk about this amongst
21 yourselves until you get to that deliberation.
22 You've got to absorb it, keep it flowing. It's
23 going to be hard technically not to say something,
24 because you're here all day. But to really try to
25 resolve issues, that's what you shouldn't do. You

1 should resolve those in your jury deliberations
2 with your fellow jurors.

3 You know, all of you probably use either cell
4 phones, iPhones, Blackberries, the internet, but
5 don't communicate with each other through that
6 usage. Don't communicate with your family and
7 friends about the case. Not proper. Just --
8 because you -- you should be uninfluenced by
9 anything or anybody other than all of you working
10 together to get this case unanimously decided, and
11 that's what's ultimately fair to both sides.

12 Okay. This really doesn't happen very much,
13 but, you know, if there is any juror violation of
14 any of this stuff and you think it should be
15 brought to my attention, don't hesitate to do that.
16 But I'm confident you all took an oath. You know
17 what's expected of you. You want to get on with
18 this, just as I do. And I know the parties do.

19 Just remember we are a nation of laws. We
20 follow the laws. We follow the rules. We follow
21 the regulations. That's really what we're
22 committed to, and that's what makes us, in many
23 respects, the society that we are. That's why this
24 trial process is so significant, so important. And
25 your role is absolutely critical to making this

1 justice system work.

2 So thank you for your attention. I know that's
3 a lot of talking out of the gate for me, but for
4 the most part after that I'm silent until I give
5 you these periodic instructions or resolve some
6 disputes, or finally get you to that final charge
7 and instruction in the law in this case. You are
8 the judges of the facts from the competent
9 evidence.

10 The opening statements, you are going to hear
11 three today. And, you know, after the opening
12 statements, we'll probably take a break. If
13 anybody has a problem in the process of, let me
14 know, and I'll try to accommodate that. But we'll
15 get through the openings, then we'll break, and
16 start with the proof. Only the evidence or lack of
17 evidence you should consider in resolving the fact
18 issues in this case. You are the judges of the
19 facts. Thank you very much.

20 Okay. Anything from anybody before we start
21 with opening statements?

22 MR. MANGO: No, your Honor.

23 MR. LINSIN: Nothing from Tonawanda Coke,
24 your Honor.

25 MR. PERSONIUS: No, your Honor. Thank

1 you.

2 THE COURT: Okay. Okay. Something tells
3 me, Mr. Mango, you're going make the opening
4 statement for the government?

5 MR. MANGO: Yes, your Honor.

6 THE COURT: Okay. Let's get started.

7 MR. MANGO: Thank you, your Honor.

8 Good morning, we all know that a business
9 operates to make money. The bottom line for a
10 business is to turn a profit. And there is nothing
11 wrong with that. In fact, part of the American way
12 is to allow anybody to start a business and to try
13 to strike it rich.

14 However, in our society we don't believe in
15 profit at all costs. We balance that with the
16 greater good of our citizens. And such things as
17 child labor laws, consumer protection laws, and
18 environmental laws are designed to protect our
19 society from unchecked business development. And
20 so it is in the coke business.

21 Coke, a black, rocky, almost pure carbon
22 substance, formed by the burning of coal for days
23 on end is made. And in the process of making that
24 coke, a gas is formed, coke oven gas. And that
25 coke oven gas contains a number of pollutants

1 including naphthalene, ammonia, sulfur, tar, and
2 benzene, a known human carcinogen.

3 Environmental regulations have been put in
4 place so that those pollutants don't end up in the
5 air we breathe and on the ground we walk on.
6 Businesses are expected to comply. But compliance
7 means money.

8 This case, ladies and gentlemen, is about a
9 business, the Tonawanda Coke Corporation, and its
10 manager of environmental control, Mark L. Kamholz,
11 who made a choice, a business decision to increase
12 profits rather than protect the environment.

13 Now you just heard me refer to Defendant
14 Kamholz as manager of environmental control. That
15 was his job title, and in that position you'll
16 learn that he controlled all aspects of
17 environmental compliance at the Tonawanda Coke
18 Corporation since at least 1981. He was in
19 control. He was the one who interacted with the
20 United States Environmental Protection Agency.
21 You'll hear them called EPA. He was the one that
22 interacted with the New York State Department of
23 Environmental Conservation. You may hear them
24 called DEC. He was the one who corresponded with
25 them about environmental compliance, and he was the

1 one who applied for the applicable permits.

2 On the surface, Defendant Kamholz appeared to
3 be keeping Tonawanda Coke in its environmental
4 compliance. But beneath the surface you will learn
5 he was just a man concerned with the bottom line, a
6 man who chose to present the false front of
7 environmental compliance, while using every trick
8 to escape true compliance. The evidence will show
9 that he accomplished this front by knowing what to
10 say, what not to say, knowing the habits of the
11 inspectors, and importantly, using his position of
12 control.

13 Defendant Kamholz routinely escorted inspectors
14 around the plant and, in fact, before the
15 inspectors could even enter the production
16 facilities, they had to wait and be escorted by the
17 defendant. That allowed a delay which allowed the
18 defendants to engage in deception.

19 You've heard the Court talk to you about the
20 two environmental laws in play in this case. Those
21 are the Clean Air Act and the Resource Conservation
22 and Recovery Act. Both of these environmental laws
23 at their heart are self-reporting statutes. That
24 means the burden is on the business to maintain
25 compliance with the laws, and if not, promptly

1 report to EPA and DEC.

2 Under the Clean Air Act you're going to learn
3 than industrial sites that release a certain amount
4 of pollutants into the air, such as Tonawanda Coke,
5 must apply and operate pursuant to an air permit.
6 You'll also hear that called a Title V air permit.
7 Title V is the title in the Clean Air Act.

8 That permit is designed to regulate all
9 emissions going into the air. Everything. The
10 company must periodically certify that they are in
11 compliance with that permit, and it must notify the
12 authorities if new emissions are identified.

13 Likewise, the Resource Conservation and
14 Recovery Act you've heard known as RCRA, R-C-R-A,
15 requires businesses to apply for a permit if
16 they're going to treat, store, or dispose of
17 hazardous waste, and then they must manage that
18 hazardous waste in compliance with the permit.

19 EPA and DEC cannot be everywhere, and they
20 certainly cannot inspect -- I'm sorry, do
21 inspections 24 hours a day, seven days a week at
22 every industrial facility in the country or in New
23 York State. That is impossible.

24 Therefore, some of the responsibility falls on
25 the shoulders of industry and individuals like

1 Defendant Kamholz. However, instead of being
2 forthright and honest about the compliance issues
3 at Tonawanda Coke, you will hear evidence that
4 Defendant Kamholz used that position of control to
5 manipulate and deceive inspectors from finding
6 areas of noncompliance.

7 Defendant Tonawanda Coke Corporation and
8 Defendant Kamholz are charged in all of the 19
9 counts of the indictment. Counts 1 through 15
10 allege the defendants violated the Clean Air Act by
11 operating their coke facility in violation of their
12 Title V permit. Specifically Counts 1 through 5
13 charge that from 2005 to 2009 the defendants
14 violated their permit by releasing coke oven gas
15 from a pressure release valve in the by-products
16 department.

17 You'll hear more about that during the trial.
18 You're going to learn that the pressure release
19 valve wasn't listed on their Title V permit, and as
20 such that was an unpermitted emission source, a
21 violation of the permit, a criminal offense.

22 Witnesses who actually worked at Tonawanda Coke
23 will describe this emission source as something
24 they called the bleeder valve. You will hear that
25 every 20 minutes or so this would pop open, and it

1 would bleed, using their terms, benzene containing
2 coke oven gas into the atmosphere. Now sometimes
3 the releases were short, 15, 30 seconds, but every
4 half hour, every 20 minutes approximately.

5 But you're also going to hear sometimes those
6 emissions were continuous. The valve was open all
7 the time. In fact, you're going to hear testimony
8 from a couple witnesses that while that bleeder
9 valve or pressure release valve, you may hear it
10 called the PRV, the pressure release valve. While
11 that was releasing, lightening struck it, and sent
12 a 10-foot tall flame into the air. Obviously
13 corrective measures needed to be taken by the plant
14 personnel to get that blow torch out.

15 Counts 6 through 15 deal with pollution control
16 devices known as baffles. We've heard this term
17 now a couple times, baffles. During the trial
18 you're going hear that during the coke production
19 process, after the hot incandescent coke is pushed
20 out of the coke oven, it's brought by a railcar to
21 a location known as a quench tower.

22 I think you've heard that term already too. At
23 that location, the hot coke is doused with water.
24 And if you think about that, when something that's
25 2,000 degrees Fahrenheit is doused with water,

1 you're going to get a giant plume of gas, steam and
2 other matters in that gas.

3 Baffles are the items in those quench towers
4 that are designed to disrupt the air flow so that
5 particulate matter that's in that plume of gas
6 going into the air falls out, or at least slows
7 down so it doesn't make it as far off the property.
8 Baffles, sometimes they're as simple as wooden
9 beams. And the idea also is that particulate
10 matter, also called soot, will hit the baffles,
11 drop out of the gas plume.

12 You're going to hear about the two quench
13 towers at the Tonawanda Coke facility, one on the
14 east side of the property, known as quench 1, or
15 quench tower number 1, one on the west side of the
16 property known as quench 2, or quench tower number
17 2. Conditions 96 and 97 of the Title V permit
18 explicitly and unambiguously say quench towers must
19 have baffles. Clear as day.

20 But the evidence will show that at Tonawanda
21 Coke neither of those quench towers have baffles.
22 In fact, you're going learn about letters Defendant
23 Kamholz wrote to the DEC regarding the quench
24 towers. How in 1983 Defendant Kamholz requested an
25 exemption from the baffle requirement for tower

1 number 1, the east tower. I think I got them
2 backwards. The west tower, tower number 1, on the
3 west side of the property. He asked for an
4 exemption from the baffle requirement, because he
5 said you know what, we only use this on an
6 emergency basis, less than 10 percent of the time.

7 You're going to hear in 1996 Defendant Kamholz
8 again wrote to DEC. This time about the east
9 quench tower, tower number 2, about how he was
10 going to lower the tower. You're going to hear in
11 response, DEC sent a letter back saying, okay, you
12 can lower the tower. But I remind you, all quench
13 towers must have baffles. Pretty simple. Pretty
14 clear. Pretty unambiguous. However, those towers
15 never had baffles.

16 Tonawanda Coke and Defendant Kamholz never went
17 back to the DEC and said, you know what, we're
18 using quench tower number 1 more than 10 percent of
19 the time, just to let you know. That never
20 happened. He never went back to the DEC and said,
21 you know what, when we lowered the tower, we didn't
22 reinstall the baffles.

23 The evidence will show that the defendants
24 operated as business as usual, knowing full well
25 that DEC would never actually look in the towers.

1 They're dangerous places.

2 Counts 17 and 18 involve violations of RCRA.

3 For Count 17 you'll hear about two large abandoned
4 tanks in the coal field area at Tonawanda Coke.

5 These tanks were in disrepair. The witnesses will
6 discuss about how 15 years ago it was brought to
7 Defendant Kamholz's attention that there was a
8 gooey, sticky coal tar all around these tanks.

9 In response you'll hear that Defendant Kamholz
10 managed that tar by taking what's known as coke
11 breeze -- it's made in the process. It's small
12 fine little pieces of coke -- and spread it over
13 the surface of that coal tar to harden it up, to
14 make it so it wasn't as dangerous back there.

15 Additionally, you're going to hear about a
16 fire, a big fire, that occurred in the summer
17 of 2008. And during that fire additional coal tar
18 ran from those tanks out onto the ground. Now, the
19 coal tar in and around these tanks was tested on
20 two occasions by the Environmental Protection
21 Agency. And you're going to hear that the sampling
22 confirmed that that coal tar was a hazardous waste
23 because of the amount of benzene it contained.

24 Count 17 therefore relates to the storage of
25 that hazardous benzene containing waste on the

1 ground around these tanks from 1998 up until 2009.

2 Count 18 also involves these abandoned tanks.

3 And the company witnesses will discuss how after
4 the fire, Defendant Kamholz authorized a limited
5 clean up of that area. And he authorized the
6 scooping up of this coal tar sludge and the coal
7 tar, the hazardous waste, to be dumped on the coal
8 field on the ground. You'll learn that at no time
9 did the defendant have a permit under RCRA to
10 dispose of such hazardous waste in this manner.
11 And that is the essence of Count 18.

12 Now as I discussed earlier, in the process of
13 making coke there's this coke oven gas. That coke
14 oven gas is sent to the by-products unit at
15 Tonawanda Coke. It's separate from the group of
16 ovens known as the battery, where you make the
17 physical coke, where you heat the coke -- the coal
18 to turn it into coke. That coke oven gas is sent
19 to the by-products unit.

20 The by-products unit then processes that gas
21 and takes whatever recoverable material can come
22 out of the gas. One of those materials is tar.
23 Tar is similar to the tar that's used to seal your
24 driveway. But in pulling that tar out of the
25 by-products -- or in the by-products system, a tar

1 sludge is created, part of the tar that you just
2 can't use, that's too gloppy and big, and just it's
3 not smooth, falls into a box in the by-products
4 unit called the tar box.

5 That tar is also known as decanter tank tar
6 sludge from coking operations which is identified
7 and listed under RCRA as a hazardous waste. Some
8 of the material -- some of the items under RCRA you
9 test it, you see if it's got too much benzene in
10 it, and it's a hazardous waste.

11 Other items under RCRA, RCRA just says this
12 material, this is hazardous. That's how it is with
13 this decanter tank tar sludge from coking
14 operation. You're also going to hear the term
15 K087. That's the number that RCRA gives this
16 waste.

17 Count 19 involves the defendants' practice of
18 taking that K087 waste and dumping it on coal piles
19 on the ground. I expect you're going hear about an
20 exclusion under RCRA regarding this K087 waste,
21 that so long as when it's properly recycled to the
22 coke ovens, you don't need a RCRA permit. I expect
23 you're going to hear that.

24 And ultimately some of this K087 waste that was
25 dumped on the coal field on the ground did make it

1 back into the coke ovens. However, it's the
2 government's position that the intervening
3 placement of that hazardous waste on the ground
4 voided that exclusion, and that is Count 19, and a
5 crime under RCRA.

6 Those are the environmental charges we've
7 talked about. But there's another count in the
8 indictment. Count 16, which circles back to what
9 I've already been talking about, Defendant
10 Kamholz's position of control.

11 In that count you're going to -- the defendants
12 are charged with obstruction of justice in April
13 of 2009. And as part of that charge you're going
14 hear evidence that prior to 2009 local citizens
15 learned that there were elevated levels of benzene
16 in the air. They brought it to DEC's attention.
17 DEC in turn commissioned an air study. And that
18 air study, in DEC's mind, concluded that Tonawanda
19 Coke was responsible for the elevated levels of
20 benzene in the air.

21 The defendants new this as DEC had shared their
22 preliminary finding with them. EPA then got
23 involved. They scheduled a week-long inspection,
24 from April 14th to April 21st of 2009. People flew
25 in from Denver, Colorado, New York City,

1 Washington, D.C., all with EPA. They went to this
2 Tonawanda Coke plant. DEC was there as well. The
3 defendants knew they were coming. You're going
4 hear they got notice about a week ahead of time
5 that EPA was coming.

6 And so what you're going to hear is you're
7 going to hear testimony from the person who was the
8 by-products foreman at the time, Pat Cahill; that
9 just prior to this EPA inspection he went on a walk
10 with Defendant Kamholz, and as they were touring
11 the by-products area, Defendant Kamholz saw the
12 pressure relief valve go off, the bleeder. And he
13 turned to Pat Cahill and said, "We can't let that
14 go off when they're here." And in response, Cahill
15 told the defendant he would take care of it. He
16 would interfere with EPA's ability to do their job.

17 So, everyday prior to EPA arriving on site, Pat
18 Cahill would dial up the set point on that pressure
19 relief valve away from its typical setting of 80 to
20 100 centimeters of oil. You're going to hear all
21 these terms. It was raised. The idea it was
22 raised so it won't blow off as much. Yet, you're
23 going to hear evidence that it did blow off. EPA
24 noticed it. EPA at one point asked the defendant
25 about it, Defendant Kamholz. When he was asked

1 about it, he said, "I don't know what that is.
2 You're going to have to talk to the by-products
3 foreman." Interfering with their ability to do
4 their job. Obstructing justice. The evidence is
5 going to show he did know what that was.

6 Following the inspection you're going hear that
7 EPA sent Defendant Kamholz a letter. It's typical
8 in their process to ask for information. Again,
9 remember I told you, environmental laws are, at
10 their heart, self-reporting statutes.

11 So if EPA or DEC says, hey, business, we want
12 some information, the business has to respond and
13 give it. After this inspection, EPA sent a letter
14 to Defendant Kamholz asking for additional details
15 about this PRV, in response, about how it operates
16 and how long it's been there. Part of what
17 Defendant Kamholz wrote -- you're going to see the
18 letter. You're also going to see handwritten notes
19 that were seized from his office when EPA, criminal
20 EPA went in in December of 2009 and took those
21 records.

22 So you're going to see his handwritten notes,
23 and you're going to see the letter where he
24 responds back and says, the PRV opened very rarely.
25 The emissions have not been reported because they

1 are believed to be de minimus.

2 After hearing witness after witness describe
3 the frequency of the releases from this PRV, you'll
4 have no doubt that Defendant Kamholz lied to the
5 EPA.

6 So the essence of Count 16 captures the
7 deceptive conduct by the defendants prior to the
8 EPA inspection, hey, we can't let that blow off;
9 during the EPA inspection, I don't know what that
10 is; and after the EPA inspection, the PRV opens
11 very rarely. And that is keeping with a course of
12 conduct by the defendants whenever they knew they
13 were subject to scrutiny.

14 That course of conduct will be apparent after
15 you hear the witnesses discuss the charges in the
16 indictment. But it will also be apparent after you
17 hear the witnesses testify regarding other steps
18 taken by the defendants to enhance their bottom
19 line.

20 That includes removal of something you'll learn
21 about, an automatic igniter on the flare stack.
22 Where you cook the coke -- the coal to make the
23 coke, these group of ovens called a battery, that's
24 where all the coke oven gas is generated. There is
25 a flare on them. That flare is supposed to have an

1 automatic igniter.

2 You'll hear witnesses talk about the defendant
3 removed that automatic igniter, Defendant Kamholz,
4 because natural gas was too expensive to keep that
5 automatically lit. So that in an emergency, you
6 know, massive pieces of equipment are down, you
7 can't suck that coke oven gas out of the oven so
8 the oven doesn't blow up. In an emergency you know
9 what witnesses are going to tell you how they had
10 to light that? Defendant Kamholz said get a straw
11 broom, light it on fire, throw it on top of the
12 battery.

13 You're going to hear also about steps taken
14 during what you'll hear about Method 303
15 inspections. There is a lot of information in this
16 case. That is simply a private inspector came to
17 Tonawanda Coke every day. Every day Tonawanda Coke
18 had to have a private inspector come to the plant,
19 and they had to walk around the battery, this group
20 of ovens where the coal is cooked, and they had to
21 inspect it. They had to look for leaks coming out
22 of holes, on the top, out of the doors, out of
23 cracks in the walls, they had to look for all that.

24 And part of that inspection, you have to keep
25 what's called the back pressure on the oven

1 consistent. You can't change it. Well, you're
2 going to hear it was a regular practice at
3 Tonawanda Coke that when the Method 303 inspector
4 came in, who had to wait, who had to be escorted,
5 causing delay, that witnesses at Tonawanda Coke
6 will say it was a routine practice that we lowered
7 the back pressure so there wasn't as much pressure
8 in the oven, so it's not forcing as much gas out of
9 these cracks and holes and lids so they could try
10 to be in compliance. You'll hear other activity
11 too that circumvented the environmental compliance
12 laws.

13 Now during the course of the trial you'll hear
14 from several witnesses, DEC witnesses, who, on
15 occasion, went to the site and conducted
16 inspections at Tonawanda Coke. You may hear the
17 defendants claim that their violations were open
18 and obvious. In fact, they were authorized by DEC.

19 However, the evidence you hear will show that
20 no one, no one from DEC, no one from EPA, got the
21 full story as to what was happening at the
22 facility. And no one authorized the defendants to
23 engage in these illegal acts.

24 The notion of a good corporate citizen means
25 not just focusing on the bottom line, but valuing

1 the community in making business decisions. At the
2 end of the trial I will ask you to consider what it
3 means to be a good corporate citizen, and that
4 based on the evidence presented to you during this
5 trial, defendant Tonawanda Coke Corporation was not
6 a good corporate citizen, but rather, a company
7 that disregarded environmental compliance laws to
8 enhance its bottom line. And likewise, Defendant
9 Kamholz, manager of environmental control, was an
10 enthusiastic leader in devising ways to skirt the
11 laws and regulations designed to protect the
12 environment and society, all for a profit. And,
13 ladies and gentlemen, when I conclude at the end of
14 the trial, I will urge you to find the defendants
15 guilty as charged. Thank you.

16 THE COURT: Okay, Mr. Mango, thank you
17 very much. Everybody okay, ladies and gentlemen?

18 Mr. Linsin, are you going to open for the
19 defendant Tonawanda Coke Corporation?

20 MR. LINSIN: Yes, thank you, your Honor.

21 THE COURT: You're welcome.

22 MR. LINSIN: Good morning.

23 THE JURY: Good morning.

24 MR. LINSIN: We appreciate your being
25 here. On behalf of Tonawanda Coke I want to thank

1 you for your attention so far and request your
2 indulgence and careful attention throughout this
3 very important trial.

4 As you might expect, the defendant expects the
5 evidence in this case to show something
6 dramatically different than what Mr. Mango just
7 outlined. But I am pleased to hear, from what
8 Mr. Mango just said, that there is one thing about
9 which we can agree. You may remember that
10 Mr. Mango, when talking about the quench tower,
11 said, wait a minute, I think I got it backwards.
12 And he did.

13 And the government's case in this criminal
14 prosecution is backwards. Because we believe,
15 ladies and gentlemen, that the evidence will
16 actually show in this case that the EPA
17 investigation, the week-long investigation that
18 Mr. Mango referenced in April of 2009, was an
19 investigation that was conducted with a stacked
20 regulatory deck. It was an investigation that was
21 premised on misconceptions, a lack of information,
22 and a complete reversal of the way in which the
23 regulators had interacted with this company for
24 decades.

25 The evidence will show that for more than 30

1 years, from 1978 up through April of 2009, the
2 entire period where our nation's environmental laws
3 were enacted, amended, regulations enacted and
4 changed and amended, this company worked hard to
5 understand those regulations, to comply with those
6 regulations. The evidence will show that the DEC
7 regulators, the Department of Environmental
8 Conservation from New York State, worked with this
9 company on a regular basis. They were out at this
10 plant on a regular basis. Worked directly with
11 Mark Kamholz on a regular basis.

12 And one point that I think will become obvious
13 as soon as you begin seeing the evidence in this
14 case, the photographs, the aerial photographs, this
15 is an industrial site 180 acres out in Tonawanda.
16 And most of the operations in this plant, by nature
17 of what they do there, are out in the open. Very,
18 very few of the workers work inside. All of the
19 activities that are being discussed that are the
20 subject of this indictment are out in the open, are
21 out in the environment.

22 Now, Tonawanda's track record before
23 April '09 I don't want to suggest was a perfect
24 record. There were problems. There were sometimes
25 compliance issues. And DEC regulators came to the

1 company, talked to them about these issues, and
2 Tonawanda time and time again, responded, corrected
3 situations that needed to be corrected, and went
4 forward.

5 And the truth is, if you look across this
6 country with regard to big companies or small
7 companies, no company has a perfect environmental
8 compliance record. It is just not in the nature of
9 the regulations and the ability to comply a hundred
10 percent of the time.

11 But in April of '09, EPA decided that they were
12 going to apply literally a different set of rules
13 to the environmental compliance issues at Tonawanda
14 Coke. The conditions and operations that had
15 existed at that plant and had been approved and
16 allowed by the Department of Environmental
17 Conservation for decades, were all of a sudden
18 decided to be violations of the law, criminal
19 violations. And that is that stacked regulatory
20 deck that has led directly to the charges in this
21 indictment before you.

22 Let me give you a little bit of what I think
23 the evidence will show about the background of this
24 company. This is a facility, the facility itself,
25 that was opened in 1917 as a coke production

1 facility. It has been -- it was owned originally
2 by a number of other companies. Allied Chemical
3 was one and other companies earlier on. Tonawanda
4 Coke Corporation bought this company in 1978.
5 Continued the coking operations that had gone on in
6 that site since 1917. The ovens, this battery of
7 ovens that you'll come to learn about and see
8 pictures of, was built in 1962.

9 And in order for coke to be made, in order for
10 this process to work, these ovens and the people
11 that work at this facility have to work 24 hours a
12 day, seven days a week, 365 days a year. There are
13 no on-off switches at a coke oven. It has to
14 continue in operation in order to function. And
15 you will learn about what is a pretty extraordinary
16 process that goes on in these ovens.

17 As Mr. Mango said, the evidence will talk about
18 and witnesses will describe how this coke is
19 created. You will actually see a piece of coke
20 that is manufactured here. And coke is a product
21 that is created by baking coal and a number of
22 other components in these ovens at very high
23 temperature, but in an airless environment in these
24 ovens. Baking it for quite a number of hours, and
25 then pushing this coke, this hot coke, into the

1 rail cars, and the coke is then used by other
2 facilities to manufacture steel and iron. And it
3 is an essential component in those blast furnace
4 operations. And it has been produced at this
5 facility for nearly a hundred years.

6 But one of the other fascinating things about
7 this company and the operations you'll hear is not
8 just that it makes this valuable, essential product
9 for blast furnaces and foundries. As this coke
10 oven gas is brought out of the battery and brought
11 over to the by-products area, there are systems in
12 place to strip out of that coke oven gas the very
13 pollutants that Mr. Mango has discussed.

14 Coal tar is removed from that coke oven gas and
15 then coal tar itself is a salable product. It is
16 sold commercially. And it is sold for use on
17 parking lot sealants, in paints, and dyes, and even
18 some medicated shampoos and soaps.

19 The ammonia is knocked out of the coke oven gas
20 and other components of the coke oven gas are
21 removed, including a light oil that is removed and
22 itself, is a salable product. It is used to
23 enhance -- as a gasoline additive and for other
24 chemical products.

25 So these products are taken out of the coke

1 oven gas in this by-products unit that you will see
2 pictures of, and then what is referred to as clean
3 coke oven gas or fuel gas is then recycled right
4 back into the furnace. There is a major gas line
5 that goes under the roadway and right back to the
6 battery to be used again in the heating process and
7 to recapture the BTUs that are in that coke oven
8 gas.

9 You'll also hear -- because this coke oven gas
10 has value, not just for BTU value in the furnace,
11 but it is also used in the boilers in the facility.
12 For five years, most of the five years that are
13 involved in the years of this indictment, this
14 facility was on what was called cogeneration. And
15 this coke oven gas was used in the boilers to
16 actually generate electricity for the entire
17 facility. The facility, for most of the period of
18 this indictment, was off the electric grid, and it
19 was using every ounce of this coke oven gas that it
20 could get, to generate electricity for the
21 facility, because it was literally unplugged.

22 There are other recycling activities that
23 you'll hear about. Coke breeze, which are the fine
24 particles from the coke manufacturing are also
25 recycled back into the production process.

1 And you heard Mr. Mango talk about this -- the
2 coal tar sludge that is -- that drops out of the --
3 in the tar decanter in this by-products area. That
4 too is recycled back into the coke ovens precisely
5 pursuant to the very EPA regulation, the RCRA
6 regulation that Mr. Mango talked about.

7 The government understood, EPA understood, wait
8 a minute, it does not make sense to take this K087,
9 this coal tar sludge, what would otherwise be a
10 hazardous waste, and then have to go put it in a
11 landfill someplace or store it someplace in
12 perpetuity.

13 We are going to permit coke ovens, this type of
14 facility, to recycle it back into the coke mixture,
15 as long as you don't dispose of it on the land.
16 And that's what the regulation says.

17 And what you'll hear from witness after witness
18 who will come to this stand and talk about the
19 people that actually did this mixing, they took it
20 out to the coal fields with front end loader
21 operators. They put it up on top of the coal
22 piles. They mixed it into the coal pile, and then
23 put it on the conveyors that was charged into the
24 oven.

25 And you'll hear each of them say to you, every

1 one of them say, their intention was to recycle
2 that material back into the coke mix. That's why
3 they were doing it. Not a single one of those
4 witnesses will say they had any intent to dispose
5 of this material. That wasn't what they were
6 doing.

7 Now I talked a bit about Tonawanda's
8 relationship with DEC and the years of interaction.
9 You will hear evidence of that interaction. You'll
10 see records and documents regarding that
11 interaction. And what I ask you to do as you hear
12 that evidence is to recognize how important that
13 evidence is as background and context for the
14 charges the government now wants you to focus on in
15 this reshaped environmental world that they have
16 created post-April 2009.

17 That background and context will show you why
18 this indictment is a product of a stacked
19 regulatory deck. And let me begin by talking about
20 first these Clean Air Act charges. 15 of the 19
21 counts of the indictment are Clean Air Act charges,
22 and 10 of those 15 counts relate to these baffles
23 that you've already heard about. You will see what
24 these baffles were. You will understand why they
25 were used. But let me, as we begin, you will also

1 hear that, despite the fact that Mr. Mango is
2 saying that these violations were so egregious
3 because the company was just trying to save money,
4 you'll hear evidence that the cost -- the cost for
5 installation of these baffles in these quench
6 towers, when the government finally got to the
7 point of saying well, you really have to install
8 these in 2009, the cost for doing that was about
9 \$125,000.

10 Now, that's a lot of money for any one of us,
11 of course. But for an ongoing company in terms of
12 compliance costs, that is not a significant factor.
13 That is not a significant factor that would drive a
14 company to avoid compliance responsibilities at the
15 risk of some sort of enforcement action.

16 What you will hear instead in the evidence is,
17 as Mr. Mango referenced, there was -- quench tower
18 number 1 by the way is the west quench tower. If
19 you look at it on a map, it's on the left-hand
20 side, quench tower number 1. There was an explicit
21 exemption granted by DEC. And you'll see the
22 letter granting this from 1984 telling the company
23 you do not need to have baffles in quench tower
24 number 1. It's an emergency quench tower.

25 And these towers, by the way, are not elaborate

1 facilities. These are corrugated steel sheds.
2 That's really all they are. And the baffles -- and
3 you will see the baffles brought in -- the baffles
4 are nothing more than one-by-six or two-by-six
5 pieces of lumber that are stretched at an angle at
6 the top of these towers in order to knock down
7 particulate matter when the coal -- the coke is
8 quenched.

9 So we're not talking elaborate systems here.
10 We're not talking systems that prevent the emission
11 of any dangerous gases into the environment.
12 They're meant as a fairly basic and rudimentary
13 system to knock down particulates.

14 And so the years will show that there were not
15 baffles in quench tower number 1 because there was
16 an exemption, and everybody knew the exemption was
17 there.

18 There was this exchange of letters, and you'll
19 see the letters in 1996, about quench tower number
20 2 being lowered, this shed being lowered, and the
21 baffles were removed.

22 Now baffles were not reinstalled in that quench
23 tower. But what you will also hear, and the
24 evidence that you'll hear from another witness on
25 this stand is that the DEC inspector who was

1 charged and goes out to this facility every single
2 year from 1996 to 2009, he's out there every year,
3 and he'll tell you I knew there weren't baffles in
4 quench tower number 2. I understood that. And I
5 made a judgment call. This DEC inspector will say
6 I made a judgment call. I didn't think they were
7 that significant. So I never wrote the company up.
8 I never told them they had to install baffles, even
9 though I knew they weren't there.

10 But then in April of '09 all of a sudden EPA
11 discovers there are no baffles in these towers.
12 And that discovery has led to more than half of the
13 charges in this indictment. That's not even
14 dealing. That is not the way regulators are
15 intended to regulate a company.

16 What you'll also see, and this I think is a
17 very telling piece of evidence, an email that
18 relates directly to these baffles, an email from
19 December of 2009. So this is eight months after
20 this April '09 inspection by EPA. You'll see an
21 email from a fellow named Ken Eng, E-N-G. And he
22 was the chief of EPA's Region 2 -- that encompasses
23 the New York area -- Region 2 air compliance
24 branch.

25 And after this discovery of no baffles in the

1 quench towers Mr. Eng writes to a number of his EPA
2 colleagues, we have finally become aware that DEC
3 had granted Tonawanda an exemption for these
4 baffles in quench tower number 1. It finally
5 dawned on us, and he says in the same email that
6 DEC -- DEC, the regulatory agency, accidentally left
7 that exemption out of this Title V air permit that
8 governs the facility. They missed it. They
9 accidentally failed to put it in. And then Mr. Eng
10 goes on to say, and TCC never caught -- didn't
11 catch this mistake by DEC.

12 Now that very same permit requires the
13 regulatory agencies, not surprisingly, if they
14 realize they made a mistake, that permit requires
15 them to correct that mistake. But what was done
16 here instead was that EPA just goes forward and
17 orders the company to install baffles in quench
18 tower number 1, and the company does it.

19 But you will find in this indictment five of
20 those ten baffles counts relates to the baffles in
21 quench tower number 1, the tower for which DEC had
22 granted an exemption, and DEC had just failed to
23 put it in the permit, and Tonawanda never caught
24 it. That is not straight dealing.

25 Now the PRV counts, the first five counts, let

1 me tell you a little bit about what I think the
2 evidence is going to show about the regulatory
3 history of that particular valve in the by-products
4 area.

5 You will hear, I anticipate, the evidence will
6 be that when that valve was installed on the coke
7 oven gas line, those types of valves were exempt
8 from regulation under New York State air emissions
9 regulations. There was an exemption in the New
10 York regulations.

11 And you'll also see -- and you be the judge of
12 this, ladies and gentlemen, you'll see photographs
13 of this -- of this valve in the by-products area.
14 And this valve is about as open and as obvious as
15 something could be for anybody that was intending
16 to look for it. It's right there on the coke oven
17 gas line. The coke oven gas line at that point in
18 the plant is about as high as the ceiling in this
19 courtroom, and the valve sticks straight up from
20 it, and you'll see photographs. Right next to the
21 by-products area, right downstream, by the way, of
22 where this clean gas goes back to the ovens on the
23 way to the boiler house.

24 So you'll see that the company did not put this
25 PRV literally in its permit because there was this

1 exemption. The permit by itself does speak to and
2 talks about requirements generally for PRVs at the
3 facility. Those provisions are in the permit.

4 You'll also see -- now permit, you'll see, was
5 issued in May of 2002. The very next year the
6 company, as required by regulations, they hired an
7 outside consultant to do a study of what are called
8 hazardous air pollutants, HAPs H-A-P-S, at the
9 facility. And they're required to do an estimate
10 of what the leakage of these hazardous air
11 pollutants might be at the plant. And they
12 literally go around and identify every valve and
13 every source that might be emitting hazardous air
14 pollutants.

15 The company retains this consultant, prepares a
16 report, and in 2003 files this HAPs emission study
17 with DEC. In that study, the very PRV that EPA
18 says they discovered for the first time in April of
19 '09, that PRV is specifically listed in this
20 emission study that was sent to DEC in 2003, was
21 studied by EPA and reviewed by EPA that very same
22 year.

23 So the company didn't believe, because of the
24 regulation, that it was required to be in the
25 permit. But the very next year they notified the

1 agencies, yes, there is this PRV in the facility in
2 the by-products area, and open and obvious to
3 anybody that walks through the plant; open and
4 obvious, we suggest the evidence will show, to any
5 of the DEC inspectors that walk through that plant.

6 At the April '09 inspection there is, in fact,
7 an explicit discussion about this PRV. The
8 inspectors see the valve release. There is a
9 discussion. I expect -- I do not expect the
10 evidence will show what Mr. Mango suggested in
11 terms of the dialogue. But this week-long
12 inspection progresses. The inspectors are out
13 there every day.

14 At the close-out meeting of this week-long
15 inspection, the DEC and EPA inspectors sit down
16 with the folks at Tonawanda, talk about their
17 findings, and, say, listen, about that PRV -- and
18 there had been information exchanged back and forth
19 during the week about what happens to the PRV.
20 They showed the inspectors where the gauges were
21 recorded, where the pressure readings were made.
22 And the only request, only request that the
23 regulators make at the end of this week-long
24 inspection is, by the way, will you please set
25 that -- elevate that set point a little bit so it

1 doesn't go off as much?

2 They did not cite the company for a violation.
3 They did not direct the company to do anything
4 about this PRV that has been sitting there since
5 1987 approximately. And as a matter of fact, from
6 April of '09 all the way until the end of December
7 of 2009, neither EPA nor DEC says anything to this
8 company about blanking it off, or adding it to its
9 permit.

10 And the company decides early the following
11 year, February of 2010, to blank it off itself
12 voluntarily. And another flare is constructed in
13 the by-products area. And then six months after
14 this flare is voluntarily blanked off by the
15 company, without any direction from the agencies,
16 an indictment is filed charging the company with
17 five felony counts, one per year, for having this
18 unpermitted valve in the by-products area from 19
19 -- I'm sorry, from 2005 through the end of 2009.

20 So despite the fact it was exempted when it was
21 installed, that there were yearly inspections by
22 DEC inspectors throughout the period of the
23 indictment, despite the fact that the company had
24 explicitly notified DEC and EPA, we've got a PRV in
25 the by-products area -- you will see this

1 document -- and despite the fact that after this
2 April '09 inspection no regulators said anything to
3 the company about having to change the valve or
4 remove the valve, six months after the company
5 blanks it off, five felony counts, Counts 1 through
6 5 in this indictment. That is not straight
7 dealing.

8 There will be discussion and evidence about
9 this coal tar sludge. You will hear quite a bit
10 about the regulation that governs this coal tar
11 sludge. It is, as we've said, a product that EPA
12 has listed as a hazardous waste unless it is
13 recycled. And the fact is from 1978 all the way
14 through until April of 2009 the company was
15 recycling this coal tar sludge in exactly the same
16 way, openly and obviously out in this coal field --
17 and you'll see the pictures of it -- by doing
18 exactly what I said. Taking these front end
19 loaders putting it on the coal piles, mixing it up
20 and charging it into the ovens.

21 And you'll also see a different set of DEC
22 regulators -- now these are RCRA DEC regulators --
23 out at the facility in 1989, 1997, 2001, and 2007.
24 And they file reports saying, hey, this coke oven
25 facility isn't generating hazardous waste, because

1 this sludge, this coal tar sludge is being
2 recycled. They approve the very process that is
3 the basis for this Count 19 in this indictment.
4 The very process that was done on a weekly basis at
5 this facility out in the open for all to see.

6 Now the one exception you will hear evidence
7 about, and I expect -- well, the exception is that
8 in 2004 there was a decision made because a couple
9 of other facilities in this area were shutting
10 down -- the Allied Chemical plant and Bethlehem
11 Steel -- they had some excess coal tar sludge at
12 their facilities. And there was a decision made to
13 move some of that coal tar sludge that was
14 generated at other facilities to the Tonawanda
15 facility so that it could slowly be worked into the
16 coke production process at that plant.

17 And because the company knew that it could not
18 handle all of this outside coal tar sludge at once,
19 they made a decision to construct a concrete pad
20 out in the coal field. And you'll see pictures of
21 this pad. And when this outside coal tar sludge
22 was brought in, it was stored on this concrete pad,
23 and then slowly mixed in to the coal over time as
24 the process could take it.

25 Even though it had never been raised before,

1 even though none of the DEC RCRA regulators had
2 ever said anything about the process that was
3 routinely used to recycle Tonawanda's coal tar
4 sludge, as of April 2009, EPA says, you know what,
5 you should have been mixing this coal tar sludge on
6 this concrete pad the whole time. And your failure
7 to have done that is a crime. That's not straight
8 dealing. When Tonawanda was told in -- toward the
9 end of 2009, listen, you need to mix it on the pad,
10 they complied. That's what they started doing and
11 that's what they've done.

12 You're also going to hear evidence about these
13 old storage tanks. And I don't want to impose on
14 your patience, but let me go quickly to those two
15 counts, 17 and 18. These are old tanks that had
16 existed at this facility since before Tonawanda
17 purchased the facility. The evidence you'll hear
18 is that Tonawanda itself never put in any material
19 into these tanks, and never put any material --
20 there was material in the tanks and this coal tar
21 residue on the ground in between the tanks when
22 Tonawanda bought this plant. They never added any
23 waste to those -- to that site at all.

24 There was a point in time, as Mr. Mango
25 referenced, when some breeze, some of this

1 crushed-up coke, was spread out on the area to
2 cover it up. But there was never any intention --
3 and you'll hear this testimony -- never any
4 intention to actively manage this material or to do
5 something to manage it in a way that would kick in
6 the regulation.

7 Because what you'll hear the law is about
8 material like this -- the Judge will instruct you
9 eventually about the law, but some of the witnesses
10 will talk about the regulations that govern
11 material like this. Because this was material that
12 was in place before RCRA was even enacted and
13 before the regulations defined some waste as
14 hazardous or not, because it was there beforehand
15 and abandoned by the prior owner, it was not
16 covered by RCRA. It was not -- it did not come
17 within the RCRA regulations, unless or until the
18 new owner of that site decided to actively manage
19 that waste. If you did that, then you had to do it
20 according to RCRA.

21 And the evidence will show that the first time
22 Tonawanda did anything that would come close to an
23 active management of this material was in 2009 when
24 they made a decision to recycle again, recycle some
25 of this coal tar residue from one of the tanks, and

1 they took an excavator, scooped some of it out, and
2 again went out and mixed it with the coal, just as
3 they had done with this coal tar sludge, and as
4 they had been doing since 1978. But now, now the
5 government wants to say no, no, that's not proper
6 recycling, that's disposal. And that's Count 18.

7 The government will produce expert witnesses
8 regarding the Clean Air Act, regarding RCRA. The
9 defense will also offer expert witnesses on these
10 RCRA issues.

11 And you will hear the testimony of Marcia
12 Williams, who was with EPA headquarters for 18
13 years, who was for the last three years of that
14 agency was the head of that office's -- the Office
15 of Solid Waste at EPA headquarters, and was the
16 manager for the national program for RCRA
17 development in the early '80s. She was
18 responsible, the person responsible for overseeing
19 implementation of RCRA during this formative period
20 when all these RCRA regulations were written. She
21 has since served on the board and in consulting
22 roles with industry regarding management of waste
23 material and compliance with the environmental
24 laws.

25 And another individual, a fellow named Steve

1 Williams will come in and testify as an expert for
2 the defense. He used to head Arizona's office of
3 waste programs, and then was chief for EPA Region 9
4 out on the West Coast. Chief of their RCRA
5 enforcement office.

6 Both of those individuals will come in and tell
7 you about the RCRA regulations that apply to the
8 management of this waste. They will both explain
9 to you that what this company did was -- with
10 regard to the coal tar sludge on a regular basis
11 throughout the years was entirely compliant with
12 the RCRA regulations. They will tell you that this
13 material, this coal tar residue that existed in
14 these tanks before Tonawanda even bought the
15 property, that was not under the regulations
16 governed by RCRA until Tonawanda decided to take
17 some of it out and to recycle it into the coke
18 ovens. That will be their testimony about how
19 these operations complied with the RCRA laws.

20 The evidence, ladies and gentlemen, will show
21 you, I believe, that the allegations in this
22 indictment are riddled with inconsistencies. They
23 are contrary to years of practice and procedure
24 that were known to and approved by either expressly
25 or implicitly by DEC. And the charges are also

1 contrary to the very regulations that are cited in
2 the charges.

3 The evidence will show that from April
4 '09 forward EPA made a decision to ignore the
5 regulatory history of this facility, to ignore the
6 prior interpretations that apply to this company's
7 operations, and to apply an entirely different
8 standard. And it is that different standard that
9 has produced the indictment that is before you, the
10 product of a stacked deck approach to regulatory
11 enforcement. And that is a flaw, the evidence will
12 show you, a flaw that pervades every single count
13 of this indictment.

14 On behalf of Tonawanda Coke, as we get started
15 on what we do expect will be a several-week trial,
16 I want to thank you in advance for your patience,
17 for your service. I know it's not easy for any of
18 you. But it is for a number of reasons, as the
19 Judge mentioned yesterday, and also to Tonawanda
20 Coke it is very important. And so we appreciate
21 your attention, and your patience, and your time.

22 But before I sit down I have three requests
23 that I would like to make on behalf of my client.
24 We ask you throughout this trial to try your best
25 to be fair to both sides, to all parties in this

1 case. Listen to the government's evidence and
2 weigh it fairly. Listen to the cross-examination
3 of the government's witnesses that we may make, the
4 answers the witnesses give in response to
5 cross-examination, and the evidence the defense may
6 choose to introduce at the end of the government's
7 case. Weigh it all fairly. Use your common sense
8 and wait, as the Judge said yesterday, to reach
9 conclusions until you've heard all the evidence.
10 Because the reality is in a trial like this,
11 especially a trial of this length, you may hear
12 something next week or two weeks from now, a piece
13 of evidence, a piece of testimony that ties
14 directly into a witness you may hear today and
15 either contradicts that witness or supplements that
16 testimony or makes something clearer. So please
17 resist the temptation to reach decisions and
18 conclusions before you've heard it all, and see how
19 it all fits together, and whether it all fits
20 together as the government suggests.

21 The second request I have is, even though it
22 will be a lengthy trial, we ask you to listen
23 carefully to this evidence. I suspect, I guess I
24 know, that none of you has worked in a coke plant
25 before. Some of these terms will be unfamiliar.

1 The lawyers in the case and the witnesses I believe
2 will do our best to try and explain these issues so
3 that you can understand them through the testimony.
4 But it's just not natural for anybody over a period
5 of weeks like this for your attention to wander,
6 for some testimony to be determined to be less
7 interesting than others. But we implore you to pay
8 attention throughout. This is, we know, a very
9 unnatural process in some ways. You will be the
10 judges of the facts, as Judge Skretny has already
11 told you.

12 But you will be sitting there for the most part
13 silent throughout the trial. That's not the way we
14 normally figure things out in life. But listen
15 carefully to the evidence. As the Judge has said,
16 you'll have the opportunity at least with the
17 experts, if necessary, to ask your own questions,
18 and use that time to try and absorb this evidence
19 that we believe is very, very important despite the
20 duration of this trial.

21 Now the third request I have, and it's one I
22 will make at the conclusion of the trial, I will
23 come again at the conclusion to provide what is
24 called a closing argument. And at that time I will
25 ask you after all the evidence is in to return

1 verdicts -- unanimous verdicts of not guilty as to
2 each and every count in this indictment. Because
3 that is what straight dealing requires. Thank you.

4 THE COURT: Okay, Mr. Linsin, thank you.
5 Ladies and gentlemen, we're going to take a
6 15-minute break, and then we'll wrap up with the
7 final opening statement this morning. So we'll
8 start again at ten of 12.

9 (Jury excused from the courtroom.)

10 THE COURT: Okay. Thank you. We'll see
11 you in 15.

12 (Short recess was taken.)

13 THE COURT: Sorry for the delay. I had an
14 unanticipated phone call.

15 MR. MANGO: Judge, before the jury comes
16 out, I don't know if we're going to proceed into
17 the next witness following Mr. Personius's opening.
18 We do have some enlarged aerial photographs. I
19 apologize I meant to bring this up before now. We
20 have an easel. It's hidden back there. I was
21 wondering if it would be permissible to put it up
22 just in front of the flag over there, so that the
23 aerial photo could be viewed by yourself, the jury,
24 and the witness.

25 THE COURT: Has defense counsel seen it?

1 MR. MANGO: Yes.

2 THE COURT: Anything demonstrative there
3 has to be a pre-exchange on it.

4 MR. LINSIN: Can I just inquire through
5 the Court when -- when you will be displaying the
6 enlargements, will they simultaneously be
7 broadcasting the exhibit itself on our screen? It
8 would just be very difficult --

9 MR. MANGO: Yes, we will.

10 THE COURT: All right. I hope you do
11 that. I mean, it kind of works in a double whammy
12 positive fashion if you do that. We don't have to
13 struggle to move around, that whole kind of thing.
14 So that will work.

15 I think what we're going to do is, we're going
16 to hear Mr. Personius, if he's a man of his words
17 and it goes roughly 20 minutes --

18 MR. PERSONIUS: It will probably be
19 shorter.

20 THE COURT: I'm sorry?

21 MR. PERSONIUS: It will actually I think
22 be shorter than 20.

23 THE COURT: Oh, okay.

24 MR. PERSONIUS: Just because Mr. Linsin
25 covered a fair amount of what I was going to say,

1 and I'm not going to repeat it.

2 THE COURT: I don't know if it's fair to
3 blame Mr. Linsin for that.

4 MR. PERSONIUS: I tried to give him
5 credit, but here I go again.

6 THE COURT: Okay. You do what you have to
7 do. I think what we'll do we will at least start
8 with the stipulation, that would be the
9 commencement of proof. My feeling is that maybe we
10 should break at that point, and then start with
11 live witness testimony no later than 2:00 o'clock.

12 MR. MANGO: Great.

13 THE COURT: Okay.

14 MR. MANGO: Thank you, your Honor.

15 THE COURT: Please have a seat.

16 Chris, if you will. And thank you.

17 (Jury seated.)

18 THE COURT: Please have a seat. Thank
19 you. Okay. Welcome back. I take part of the
20 blame for giving you a little extra time, and I
21 apologize. We did a very little bit of work with
22 the attorneys to clear up some exhibits. But I
23 have to be reminded to give Michelle a little bit
24 of a break, taking all the stuff down. And then I
25 had an unanticipated business phone call from

1 another judge that I had to wrap up. So I
2 apologize for that. It shouldn't happen too often.

3 We are resumed in the case of United States
4 versus Tonawanda Coke Corporation and Mark L.
5 Kamholz, defendants. And as you know, you have
6 heard from two of the three attorneys that are
7 prominent with respect to the defense of the --
8 that represent the parties in this particular case.
9 You heard from Mr. Mango and Mr. Linsin. And now
10 you're going to hear from attorney Rod Personius,
11 who represents Mark Kamholz, the defendant.

12 So Mr. Personius, if you will, please.

13 Keep in mind, ladies and gentlemen, that what
14 the attorneys say is not evidence. Okay. It's
15 intended to give you what you've been getting, a
16 bird's-eye view essentially or roadmap with respect
17 to the case and what it's about, and the
18 amplification of some specifics. We'll find out
19 what Mr. Personius has to add.

20 Mr. Personius.

21 MR. PERSONIUS: Thank you, Judge. If it
22 may please the Court, Mr. Mango, Mr. Piaggione,
23 Mr. Linsin, Miss Grasso, Mr. Glasner, members of
24 the jury, don't let the facts get in the way of a
25 good story. You may have heard that expression

1 before. And having heard Mr. Linsin's opening
2 juxtaposed against the opening given by the
3 government, you may get a sense of what the defense
4 is in this case.

5 I'm sure that after you heard the excellent
6 presentation by Mr. Mango, even though you're not
7 supposed to do it, because you're supposed to
8 presume the defendants innocent, you were probably
9 thinking in your head why are we here? Wow, this
10 is a good case for the government.

11 But through the presentation that Mr. Linsin
12 gave, you hopefully have some appreciation that
13 there is another side to this story. That there
14 are viable defenses to each and every one of these
15 charges.

16 There was a commentator, and I'll show my age
17 by mentioning it. Probably none of you will
18 remember this. But he had a deep voice and he was
19 a gifted story teller, and his name was Paul
20 Harvey. And he would start out giving a little bit
21 of background on something, and then -- I won't do
22 it the way he does it -- now the rest of the story.
23 And he'd go on to explain something that was
24 entirely different than what you thought it was
25 going to be, and it was very compelling theater the

1 way that he did it. He was outstanding at what he
2 did.

3 And in a certain sense, it's our hope, both
4 mine on behalf of Mr. Kamholz and Greg and Jeanne
5 and Ariel on behalf of Tonawanda Coke, that you'll
6 allow us during the course of this trial, not in
7 the compelling fashion that Paul Harvey would do
8 it, and certainly not in five minutes, but to give
9 you the rest of this story.

10 I'm going to be brief, and that should bring a
11 smile to everybody's face, I hope. Because I'm not
12 going to repeat what Mr. Linsin said.

13 But what I do want to say is this: And just to
14 summarize and maybe embody in one word what
15 Mr. Linsin has told you about what our defenses
16 are, and that is that ultimately what this case is
17 is about fairness. What's right? What's fair?

18 Is it fair for one regulatory agency over the
19 years, the DEC, the New York State agency, to lead
20 you to believe, the company and Mr. Kamholz, that
21 activities can take place in a certain way, that
22 everything is okay, and then to turn around and
23 have the EPA come in and change all that in a New
24 York second and say no, no, no, it's not going to
25 be that way. It's going to be entirely different.

1 Not only is it going to be entirely different, but
2 we're going to make this criminal charges out of
3 conduct that, in the past you were engaging in,
4 that the New York State DEC -- as you heard from
5 Mr. Linsin -- said this is okay to do it this way.

6 And maybe to capture that concept in what we
7 expect will be the testimony you'll hear from one
8 of the witnesses, there's a former DEC inspector
9 whose name is Gary Foersch, and he was out at the
10 Tonawanda facility a lot during the important time
11 period going back to the 1990s. He was an air
12 inspector with the DEC. And he had a good
13 relationship, as really most of these regulators
14 did. Not all of them, but most of these regulators
15 had a very good relationship with Mr. Kamholz and
16 viewed him as a square dealer.

17 But Mr. Foersch was interviewed by our
18 investigator within weeks after Mr. Kamholz was
19 arrested out at the Tonawanda Coke facility on
20 December 17th of 2009 and taken in handcuffs out of
21 his office, a week before Christmas. And
22 Mr. Foersch was interviewed, and at the conclusion
23 of the interview after he had described how he had
24 handled matters -- how he had handled matters with
25 Mr. Kamholz and Tonawanda Coke, he said, "I guess

1 the DEC is going to get a bloody lip and a black
2 eye out of how this was handled."

3 We are not here to bloody up the DEC. We're
4 not here, frankly, to bloody up the EPA either.
5 But we are here to defend our clients, and if in
6 doing so we have to call certain behavior on to the
7 carpet, that's what we're going to have to do.

8 Now, Mr. Mango talked to you about the
9 different counts in the indictment. He talked
10 about these permits -- or the permit requirements
11 that were violated with respect to this pressure
12 relief valve, with respect to the baffles, and with
13 respect to the disposal of both the coal tar around
14 these abandoned tanks and the coal tar sludge from
15 Tonawanda coking operation.

16 What you heard from Mr. Linsin in a nutshell is
17 that's all well and good to say you didn't have a
18 permit for this, you didn't have a permit for that.
19 What you should take away from what Mr. Linsin told
20 you is that the evidence will show that there were
21 exemptions, there were exceptions that applied to
22 this activity. And as of -- not even as of April
23 of 2009 at this inspection, which was a watershed
24 event, but it really occurred over a course of time
25 after that.

1 But what happened after that is that everything
2 changed. There was world change and in the
3 enforcement. And again the over-arching question
4 is, is that fair? Should we really be here
5 charging the company and Mr. Kamholz with criminal
6 conduct based on this activity?

7 Now, Tonawanda Coke was not run perfectly. It
8 was a large company. It is a large company. It
9 employs a lot of people, over a hundred people.
10 And just the nature of the business is very
11 challenging. So it's not run perfectly. And
12 there's no question that during the course of this
13 trial you're going hear certain evidence about the
14 imperfect operation of that company.

15 But when it comes to the counts that are
16 charged in the indictment, when it comes to the
17 PRV, when it comes to the baffles, when it comes to
18 the coal tar residue around the abandoned tanks,
19 and when it comes to the coal tar sludge from
20 Tonawanda's operation, that's a different matter.

21 The other thing that Mr. Mango mentioned in his
22 opening that I want to speak to is he mentioned
23 that this is a self-reporting situation because
24 these regulators can't be everywhere all of the
25 time. They can't be at every company 24 hours a

1 day, seven days a week, 365 days a year. And what
2 he suggested in his opening is who are we going to
3 hold accountable for that? Who is supposed to be
4 there 24 hours a day, seven days a week and 365
5 days a year? And the implication from his comment
6 is Mark Kamholz.

7 We're going to hold Mr. Kamholz responsible for
8 every single activity that occurs at Tonawanda Coke
9 over the five-year period that's covered in the
10 indictment and even before that, because one of the
11 charges goes back to 1998. And why? Because he
12 was the environmental manager going back some 30
13 years at Tonawanda Coke.

14 And just so it's clear, what you're going to
15 find out from the evidence is that if there is --
16 and I don't really think there is -- but if there's
17 this financial motive in this case, Mark Kamholz
18 doesn't have that financial motive. He was the
19 environmental manager. By that don't think that
20 means he was an officer of the company, that he was
21 a director, that he was an owner. He was a
22 salaried employee of Tonawanda coke, who would go
23 to work, do his eight hours, do it well, and then
24 go home. And obviously do it well, because he's
25 been doing it there for decades.

1 You'll find from the evidence that Mark is now
2 65 years old. His wife Sandra, who is here in the
3 front row with the reddish, chartreuse, whatever
4 color that is top on. They've been married for
5 about 30 years. He has two sons. I won't get them
6 in the right order. One is Jeremy and one is
7 Jordan. They're here today to support their
8 father. They run a landscaping business. He lives
9 in West Seneca.

10 He's a military veteran. He served six years
11 in the Army National Guard. You'll find this out
12 from the evidence, because it turns out one of
13 these DEC inspectors, whom we expect will testify,
14 served in the Army National Guard with Mark
15 Kamholz, so he's known him for a long period of
16 time.

17 Now, the other thing that we want to point out
18 to you is that Tonawanda Coke is, in a certain
19 sense, it's a community. And what I mean by that
20 is you've got over a hundred people working there.
21 And like any community, when you got a
22 conglomeration of people, you're going to get all
23 shapes and sizes in that community. A lot of those
24 members of that community are going to come in here
25 and testify. I assure you that their manner of

1 presentation, their recollection, the reliability
2 of their testimony, whether there's a motive for
3 the way that they testify, whether they're
4 susceptible to testifying as to, what I would call,
5 anecdotal evidence.

6 Anecdotal evidence is the type of thing like my
7 dear wife Louise, if she hears one bad thing about
8 a restaurant, we are never going there again,
9 because one person told her I had a bad meal there.
10 That's it. We don't go there anymore. It's --
11 it's one of the chains that she won't go to,
12 because that happened. That's anecdotal evidence.
13 You hear something one time, you generalize it, and
14 you make it true for all of time. That's not good
15 evidence.

16 Evidence that's based on anecdotes is not good
17 evidence. Evidence that comes from someone who has
18 a motive to spin things in a certain way is not
19 good evidence. Evidence that comes from someone
20 who has a poor recollection, or whom you can see is
21 guessing or speculating, that's not good evidence.

22 Chief Judge Skretny told you during his
23 instructions that all you need to do is to come
24 into this courtroom with the same tools that you
25 use in your own affairs, the most important of your

1 own affairs to decide what you're going to do and
2 to assess whether or not somebody's telling the
3 truth. If you use those same tools in this
4 courtroom, you'll do just fine. And we know all of
5 you will because you told the Judge and you've told
6 us that you will do that.

7 This trial -- and I know this doesn't make all
8 of you happy, but it's going to be a marathon.
9 It's not going to be a sprint. It's going to take
10 a lot of time to get this evidence in. It's going
11 to take weeks, not days, and that's regrettable,
12 but it's just the nature of the charges and the
13 nature of the evidence that we have to deal with.

14 Mr. Linsin has talked to you about the need to
15 not make judgments early, listen to all the
16 evidence as it comes in, consider not just the
17 direct and the cross, and all of that is very, very
18 true.

19 The other thing that's true in a case like this
20 is that it's vitally important that you follow the
21 rules, that you follow the presumption of
22 innocence, and you presume both these defendants to
23 be innocent through the entire trial. Through the
24 summations they are still presumed innocent, and
25 that when that time comes for the 12 of you who are

1 going to deliberating to go off to deliberate, that
2 you hold the government to its burden of proof, to
3 proof beyond a reasonable doubt. And I know the
4 government embraces that burden. They come to this
5 courtroom knowing that that's what they have to
6 show you.

7 Now, the only count in the indictment that has
8 really not been talked about much is that
9 obstruction count where it's alleged that
10 Mr. Kamholz within several days to a week before
11 this big inspection in April of 2009 talked to a
12 gentleman named Patrick Cahill, who was the foreman
13 of the by-products area where this pressure relief
14 valve is located. Talked to him about the valve
15 which it's indicated went off when Mr. Kamholz was
16 talking to Mr. Cahill.

17 And the allegation of the government is that
18 when Mr. Kamholz responds to that valve going off
19 by saying "that can't be going off while they're
20 here", that that becomes obstruction of justice.
21 If you consider the entire body of evidence that
22 surrounds that conversation and what occurred over
23 the following week, if you consider the rest of the
24 story, if you allow the facts to get in the way of
25 a good story, you're going to come to an entirely

1 different conclusion on what Mr. Kamholz's purpose
2 was when he said that. And when later, during the
3 inspection, in fact, that valve still went off,
4 even though he had told Mr. Cahill we don't want
5 that going off, it went off, and when it went off,
6 you'll find from the evidence that what Mr. Kamholz
7 said was, was that steam, because he actually
8 thought it was steam. And then he was asked by one
9 of the regulators what is that. And he was
10 truthful. In his response he said that's a
11 pressure relief valve. And then they wanted to
12 know more detail about it. He did exactly the
13 right thing. He referred them to the head of the
14 by-products area, Patrick Cahill.

15 It's his area. He works there eight hours a
16 day, five days a week, 52 weeks a year. So who
17 should he have referred the regulators to when they
18 wanted to know how a piece of equipment in the
19 by-products area, how it worked? And what you'll
20 hear from Mr. Cahill is -- we understand his
21 testimony will come in, is that Mr. Cahill was then
22 completely truthful with these regulators,
23 completely truthful with these regulators on how
24 that valve worked. He took them down where the
25 pressure setting was, showed them how that worked.

1 He answered all of their questions.

2 During that inspection you'll find there were
3 other times when there were questions in the
4 by-products area and who did the regulators go to?
5 Did they go to Mr. Kamholz all the time? No. They
6 went to Patrick Cahill. So there's nothing
7 sinister, nothing sinister about this interaction,
8 certainly nothing that justifies this very, very
9 serious charge that has been brought against
10 Mr. Kamholz.

11 But that's what the evidence will be. You'll
12 have to decide ultimately where the truth lies, but
13 it's a great example of how the government will
14 tell you one thing, but when you hear, again, the
15 rest of the story, we're very, very confident that
16 you're going to come to a different conclusion.

17 I was told when I started out as a lawyer
18 sometime ago that sometimes it's a good idea to be
19 short and be seated. That's what I'm going to do
20 right now. Thank you very much.

21 THE COURT: Okay, Mr. Personius, thank
22 you.

23 And, you know, please, ladies and gentlemen,
24 keep in mind that what the attorneys say to you,
25 that's not evidence. But it can help you with your

1 consideration of the evidence, and that should be
2 controlling in your minds.

3 So we're about to start, I think, the trial
4 with a stipulation as to certain evidence, and then
5 that will be followed by live witness testimony.
6 So I think you've been oriented now to what this
7 case is about. And, you know, you've been
8 confronted with the technicalities and the
9 regulatory aspects, and you've heard about RCRA and
10 Clean Air Act. And you've heard different
11 perspectives on what the evidence will show and
12 what the differences are.

13 And that's what we talked about when we talk
14 about the fact issues that have to be resolved in
15 this particular case. That's what makes you the
16 judges of the facts. And to reiterate, the way
17 that you properly do that is to keep your minds
18 open and wait until all of the evidence is in and
19 until you get into that deliberation room and start
20 working through everything to make sure you get it
21 right. And, you know, I'm confident from certainly
22 what I've heard that you can do that by the
23 application of your common sense, your experience,
24 and your intelligence to the information which the
25 attorneys say you will be presented with through

1 witnesses and exhibits and the like during the
2 course of this trial.

3 So, you know, that's all to be looked forward
4 to. And that process will begin in short order.
5 So, again, you know, I thank the attorneys for
6 their opening statements, which pretty much went
7 according to timing estimates that we had. And it
8 should give you a little better idea than you had
9 coming into the courthouse this morning based on
10 what we discussed yesterday in summary fashion, and
11 the little additional information that I gave you
12 this morning, and then obviously you're now
13 starting to get the roadmap or the bird's-eye view,
14 so to speak, of this case and how things interact
15 and come into play. And so there's a lot more to
16 be heard, seen, observed, and presented.

17 Part of what we're doing is trying to establish
18 a rhythm, so to speak, because that will facilitate
19 moving through this case. I think what's probably
20 best is that we give Mr. Mango the opportunity to
21 start with the stipulation. Give us a chance to
22 regroup and make sure that everybody's ready for
23 that first witness. So I think what we're going to
24 to do is break right after the stipulation. And we
25 will give you an opportunity to kind of get

1 comfortable with the building and where you want to
2 go, if you want to go somewhere for lunch, get back
3 here, and we'll start at 2:00 o'clock. And then we
4 will develop the rhythm this afternoon and tomorrow
5 as we go through this, so that we don't impinge on
6 your time to any substantial extent more than we
7 have to.

8 So, okay. Mr. Mango, are you ready?

9 MR. MANGO: Yes, your Honor.

10 THE COURT: Let's see what you have there.

11 MR. MANGO: Thank you, your Honor. May I
12 approach?

13 THE COURT: You may.

14 MR. MANGO: I'd like to pass up an
15 original and a copy of a stipulation, ask that it
16 be marked as a Court Exhibit.

17 THE COURT: Okay. And a stipulation,
18 ladies and gentlemen, is an agreement as to the
19 facts and the information that's contained in the
20 document, which is actually designated a Court
21 Exhibit. And you will not get that because -- in
22 the jury room in all likelihood. You will get the
23 information from the document that will be, I
24 believe, read to you by Mr. Mango. That is the
25 evidence; it's what is contained in that document.

1 But the indicators are that all the parties and
2 attorneys agree that the contents of this
3 stipulation is properly competent evidence for you
4 to consider, should you choose to do that.

5 So, Mr. Mango.

6 MR. MANGO: Thank you, your Honor. I'm
7 reading from Court Exhibit 1 that is now marked.
8 Stipulation. Government Exhibit 74 to 80, 105.01
9 to 105.53, 305.04, 305.07, 305.09, 305.23, 305.37,
10 305.42, and 305.48. The United States of America,
11 by and through its attorney, William J. Hochul,
12 Jr., for the Western District of New York, and
13 Ignacia S. Moreno, Assistant Attorney General for
14 the United States Department of Justice,
15 Environment and Natural Resources Division, and the
16 undersigned Assistant United States Attorney and
17 Senior Trial Counsel, and the undersigned counsel
18 for defendants Tonawanda Coke Corporation,
19 Tonawanda Coke, and Mark L. Kamholz do hereby
20 stipulate and agree as follows: One, that if
21 called to testify, David Finger, Vice President for
22 Customer Technical Services at Pictometry
23 International, Pictometry, located in Rochester,
24 New York, would testify that Government Exhibit 74
25 to 80, 105.01 --

1 THE COURT: Mr. Mango, do me a favor.
2 Position yourself in the direction you did for
3 opening statements. Thank you.

4 MR. MANGO: Will do. 105.01 to 105.53,
5 305.04, 305.07, 305.09, 305.23, 305.37, 305.42, and
6 305.48 are true and accurate copies of digital
7 aerial photographs taken by Pictometry, that those
8 exhibits contain information kept in the ordinary
9 course of the regulary conducted business
10 activities of Pictometry, and it was the regular
11 practice of Pictometry to make and keep the
12 information reflected in those exhibits.

13 Two, that if called to testify, David Finger
14 would testify that Government's Exhibits -- your
15 Honor, would you like me to read all those exhibits
16 again? It's the same exhibits I've been reading.
17 I can go through or just paraphrase the exhibits
18 previously mentioned.

19 THE COURT: No. If there is an agreement
20 of counsel, we'll dispense with that.

21 MR. LINSIN: No objection.

22 THE COURT: But the record will be
23 augmented with those numbers after the Court takes
24 that particular exhibit, with the understanding the
25 jury knows we're just not repeating the same

1 numbers that you've heard.

2 Mr. Personius, any problem with that?

3 MR. PERSONIUS: No, your Honor. Thank
4 you.

5 THE COURT: Okay. Thank you.

6 MR. MANGO: Those exhibits previously
7 mentioned were taken by Pictometry personnel in the
8 regular and routine course of the business, and
9 that the exhibits were taken on the following
10 dates: Exhibits 105.01, 105.02, 105.03, 105.04,
11 105.05, and 305.04 were taken on May 11th of 2002.

12 Exhibits 77, 78, 105.14, 105.15, 105.17, and
13 105. 18 were taken on November 13 of 2004.

14 Exhibit 105.16 was taken on November 15th of
15 2004.

16 Exhibits 105.19, 105.20, 105.21, 105.22,
17 105.23, 105.24, 105.26, 105.29, 105.30, 105.31,
18 105.40, 105.41, 105.44, 105.45, 105.47, 105.48,
19 105.49, 105.50, 305.23, and 305.48 were tall taken
20 on April 21st, 2007.

21 THE COURT: Check that date again. I'm
22 sorry. Okay. Thank you.

23 MR. MANGO: Exhibits 105.08, 105.10,
24 105.11, 105.12, and 105.13, those were taken on
25 April 23rd of 2007.

1 Next set of exhibits, 105.06, 105.07, 105.32,
2 105.33, 105.34, 105.35, 105.36, 105.37, 105.38,
3 105.39, 105.42, 105.43, 105.52, 105.53, 305.07,
4 305.37, and 305.42 were all taken on April 10th
5 of 2009.

6 Exhibits 75, 79, 80, 105.09, 105.27, 105.28,
7 105.46, 105.51, 305.09 were all taken on
8 November 12 of 2010.

9 And Exhibits 74 and 76 were taken on
10 November 13th of 2010.

11 Paragraph 3. That Government Exhibits
12 previously referenced meet the requirements of
13 records of a regularly conducted activity pursuant
14 to Federal Rule of Evidence 803(6), and subject to
15 objection on any other ground, should be admitted
16 into evidence.

17 It's dated Buffalo, New York, February 27th,
18 2013, signed by myself, Mr. Piaggione, Mr. Linsin,
19 Miss Grasso, and Mr. Personius and Mr. Kamholz.

20 Thank you, your Honor.

21 THE COURT: Okay. So stipulated, counsel?

22 MR. LINSIN: Yes, your Honor.

23 MR. PERSONIUS: Yes, your Honor.

24 THE COURT: Okay. And the record will
25 reflect as accurate the stipulation that has been

1 executed for purposes of the record.

2 Okay. You've already gone through, with this
3 stipulation, probably two days' worth of trial,
4 ladies and gentlemen. That's the purpose of a
5 stipulation is to expedite as best as possible what
6 otherwise would take considerable time to move
7 exhibits to the point where they can be used in a
8 fashion that would relate to possible
9 admissibility. So this is a start to the trial.

10 You heard a reference to a Rule 803(6). Just
11 so you know, that's a business records rule, and
12 it's part of the evidence. If the records qualify
13 under a certain particular rule, then it becomes
14 competent evidence for you to consider, since you
15 choose to do that. So that's the start.

16 We're going to let you go to lunch, and we will
17 start again at 2:00 o'clock. Chris will give you
18 some directions. I don't think he picks up the
19 lunch bill the first day, but he will be there to
20 assist you and get you started.

21 You've been terrific. I know, it's all
22 necessary, and we look forward to the afternoon,
23 getting you back here. We appreciate that, all of
24 your efforts.

25 Miss Palistrant, it's good to see you back

1 again. So we'll see everybody here at what time?

2 THE JURY: 2:00 o'clock.

3 THE COURT: 2:00 o'clock. Thank you very
4 much.

5 (Jury excused from the courtroom.)

6 THE COURT: Okay. Yes, Mr. Linsin?

7 MR. LINSIN: Just very briefly before we
8 break for lunch, I wanted to put on the record -- I
9 didn't want to interrupt the flow this morning.
10 But we were listening to the Court's summary of the
11 elements of the RCRA counts this morning. We
12 understand it's summary. We understand the charge
13 conference is down the line. But with respect to
14 Counts 18 and 19, we do just want to make note that
15 our submission regarding the elements contains an
16 intent element, which we believe is very important.
17 And just given that the Court had run through this,
18 I wanted to put that on the record, so that we
19 could be clear to address it when we get there.

20 THE COURT: And the record will so
21 reflect. My purpose is to focus the jury in terms
22 of the elemental analysis that I think everybody is
23 asking them to do. I know there's been some issues
24 with respect to the proper elements for the
25 respective counts. That will be noted. And,

1 again, we'll have the finality of the charge
2 conference to make sure that everything is
3 copacetic and in order.

4 I will try to get you, you know, as quickly as
5 I can, a draft proposal with respect to the charge.
6 You know, it's a work in progress. I can't tell
7 you exactly when I'm going to have it ready. But
8 it -- once you get it, it's a living instrument.
9 It's a living document for you to fine tune as we
10 go through the case, so that when we get to the
11 charge conference time, it won't be your first
12 review. I mean, it will be a conference where we
13 can, I think, move through blocks of proposed
14 charges that you will not have issues with, and
15 then we can focus on just those that seem to be
16 stumbling blocks to a finality of the charge, okay?

17 MR. LINSIN: Thank you, your Honor.

18 THE COURT: Okay. We'll see you here at
19 what time?

20 MR. MANGO: 2:00 o'clock.

21 THE COURT: All right. See you then.

22 (Lunch recess was taken.)

23 (Jury not present in the courtroom.)

24 THE COURT: Do we have anything
25 preliminary?

1 MR. LINSIN: Nothing, your Honor.

2 MR. MANGO: No.

3 MR. PERSONIUS: No, your Honor. Thank
4 you.

5 THE COURT: Jury, please.

6 (Jury seated.)

7 THE COURT: Sorry for the slight delay.

8 I'll get it right yet. Thank you very much. Have
9 a seat, and we're about ready to get started.

10 This is the case of United States versus
11 Tonawanda Coke Corporation, defendant, and Mark L.
12 Kamholz, defendant. The attorneys and parties are
13 back, present. Our jury is here. Roll call
14 waived.

15 This is the government's case against the
16 defendants. The government has the burden of proof
17 beyond a reasonable doubt. You have heard some
18 evidence with respect to the exhibits, the litany
19 of numbers that will enable the government to
20 proceed forward.

21 I guess you have a live witness now, Mr. Mango?

22 MR. MANGO: Yes.

23 THE COURT: Okay.

24 MR. MANGO: Your Honor, the government
25 would call Alfred Carlacci.

1 THE COURT: If you would approach the
2 witness stand, please. Don't enter it, just stop
3 before you get in, and I'll have the oath
4 administered to you.

5 A L F R E D C A R L A C C I, having been duly
6 sworn as a witness, testified as follows:

7 THE COURT: Okay, thank you. Get
8 comfortable. Just a couple of preliminary
9 instructions, Mr. Witness. You are here to testify
10 for the benefit of the ladies and gentlemen of the
11 jury. What helps is if you talk at the microphone,
12 look in their direction, and talk in a
13 conversational tone. The microphone is relatively
14 friendly if you talk in that fashion.

15 When it comes to questioning, don't answer a
16 question that you don't understand, okay? Double
17 negative, but I think relatively clear. If the
18 answer can be a yes or no to a question, please try
19 to apply that. Don't volunteer information. That,
20 generally speaking, causes problems that are
21 unnecessary.

22 If there's an objection, wait until I rule on
23 the objection, then I will give you instructions,
24 continue with your answer, wait for the same
25 question to be asked again, or wait for a new

1 question. Do you understand those instructions?

2 THE WITNESS: Yes, I do.

3 THE COURT: Okay. Let's, by speaking at
4 the microphone -- you don't have to be be right on
5 top of it. Probably right about there. Why don't
6 you state your full name, spell your last name,
7 please.

8 THE WITNESS: My name is Alfred Carlacci,
9 C-A-R-L-A-C-C-I.

10 THE COURT: Okay. You carry well. Your
11 witness, Mr. Mango.

12 MR. MANGO: Thank you, your Honor.

13 DIRECT EXAMINATION BY MR. MANGO:

14 Q. Mr. Carlacci, how are you currently employed?

15 A. I'm employed with the New York State Department
16 of Environmental Conservation. I'm the regional
17 air pollution control engineer there.

18 Q. Regional air pollution control engineer. Is
19 there an acronym sometimes we may hear?

20 A. RAPCE, R-A-P-C-E.

21 Q. How long have you been employed at New York
22 State Department of Environmental Conservation?

23 A. Since September 1979, about 34 years.

24 Q. All right. And we can call that DEC. Is that
25 an acronym you use sometimes?

1 A. Yes.

2 Q. Okay. How long have you been a regional air
3 pollution control engineer?

4 A. Since November 2010.

5 Q. And what does that mean? What are your duties?

6 A. My duties, I supervise a staff of nine
7 engineers and technicians that administer the air
8 pollution program in Western New York. That
9 includes Allegany, Cattaraugus, Chautauqua County,
10 Wyoming County, Erie and Niagara County. That
11 includes air permitting of the facilities that
12 require permits to pollute the air, inspection of
13 these facilities, enforcement, as well as managing
14 the office, making sure the staff have proper tools
15 to do their jobs.

16 Q. Okay. You mentioned Western New York. Is DEC
17 broken up into regions at all?

18 A. Yes, there's nine regions in New York State,
19 each with a regional office that is governed by the
20 central office in Albany.

21 Q. Okay. Does each region have an equivalent
22 RAPCE?

23 A. Yes. Each region has a RAPCE.

24 Q. And what region technically are you in here?

25 A. This is Region 9.

1 Q. Now you mentioned you oversee permitting,
2 inspection, and enforcement programs?

3 A. Correct.

4 Q. Why don't you tell the jury, please, just a
5 little bit about what you mean by overseeing
6 permitting?

7 A. Permitting entails writing a permit for -- for
8 a source, an industry, that allows them to pollute
9 the air that meet the regulations written by the
10 state of New York and the federal government. Many
11 regs are developed through acts of Congress, like
12 the first Clean Air Act of 1970 which established
13 national ambient air quality standards. It
14 established new source performance standards for
15 new facilities being constructed. It established
16 national emission standards for hazardous
17 pollutants.

18 It also allowed the EPA to work with state
19 agencies and the states and require them to monitor
20 the ambient air to determine compliance with these
21 national ambient air quality standards, to develop
22 plans to bring the ambient air into attainment with
23 those standards if they were out of attainment.
24 That was done through a state implementation plan,
25 in that the states would have a plan that would

1 include writing additional regs, if necessary, to
2 bring specific industries in that state into
3 compliance that will lower the emissions below
4 those standards. And that state implementation
5 plan would have to be approved by the federal
6 government.

7 So that's kind of the framework how the
8 regulations are developed, how we monitor the
9 ambient air to determine if the regulations are
10 being effective. The permitting is similar to
11 establishing an inventory, also communicates the
12 regulations to the industry. You know, they have
13 a -- they submit an application. You know, as new
14 ones come along, they get an opportunity to apply
15 the regulations to determine compliance, and we
16 review those reg permits for them. So that's the
17 permitting part of that.

18 Q. Okay. How about -- you mentioned the
19 inspection program. You oversee inspection. Why
20 don't you tell the jury what that means?

21 A. To go along with the inspection, and this is
22 also part of the Clean Air Acts and requirements of
23 the federal government, that along with writing a
24 permit you have to inspect the facility to ensure
25 they're meeting those requirements. Permits today

1 are quite complicated and have, depending on the
2 size of the facility, have quite a bit of
3 compliance assurance monitoring requirements to
4 assure that they meet the emission limits as
5 accurately as possible.

6 So you would do inspections to ensure
7 compliance with those permits, and if they were out
8 of compliance, it would lead to enforcement. And
9 that enforcement you would document the issue,
10 bring it back to your attorneys in the office, and
11 with their guidance determine how to handle the
12 enforcement.

13 Q. Okay. And there are attorneys in New York
14 State DEC that you work with?

15 A. Yes. In each regional office there is a
16 regional attorney as well as a regional director,
17 and both would be involved.

18 Q. Okay. Do you have any community duties as part
19 of being the RAPCE?

20 A. As part of being the RAPCE we represent the
21 public in these situations. We deal with the
22 community with complaints, with dealing with small
23 companies, with doing outreach, explaining
24 regulations and how we interact with companies. We
25 do some training sessions on the part of the Air

1 and Waste Management Association. It's a trade
2 group of engineers, attorneys that get together
3 like a trade group to learn about the latest in our
4 environmental expertise. And we also get involved
5 in that kind of thing.

6 MR. PERSONIUS: Pardon me, your Honor.
7 I'm having trouble with the narrative responses. I
8 don't think the witness is answering the question
9 that's asked.

10 THE COURT: Well, I'll let it stand.
11 We'll monitor that. Make a more timely objection
12 so that I can gear it before --

13 MR. PERSONIUS: I thought I'd wait until
14 he finished. I apologize.

15 THE COURT: Okay. Thank you.

16 BY MR. MANGO:

17 Q. In particular, what type of activities do you
18 engage in with the community?

19 A. I do public meetings, depending on whatever
20 topic the public needs a discussion on.

21 Q. Okay. You mentioned you answer questions and
22 respond to complaints as well?

23 A. Answer questions, respond to complaints. For
24 example, we're doing a study around the Peace
25 Bridge. I've done community meetings around the

1 Peace Bridge sampling that we're doing right now.

2 Q. Okay. And where is your office physically
3 located?

4 A. Our office is located right in Buffalo on 270
5 Michigan Ave.

6 Q. Is there -- your staff of nine you mentioned,
7 are they out of that office?

8 A. Correct.

9 Q. What type of positions does your staff hold?

10 A. I have technicians and engineers.

11 Q. And what do the technicians and engineers do
12 under you?

13 A. Technicians are involved with more smaller,
14 less complicated permitting and inspection, as well
15 as enforcement. The engineers get into more
16 complicated facilities. All do basically the same
17 type of work. Some do a little bit more ambient
18 air monitoring and maintaining that equipment on
19 smaller projects such as the Tonawanda study and
20 the Peace Bridge study.

21 Q. We'll talk about that Tonawanda study in a
22 minute, okay? Are there other individuals who work
23 in Region 9 that deal with air resources but aren't
24 supervised by you?

25 A. Yes, there are. As I mentioned earlier, the

1 state is required by the Clean Air Act to monitor
2 the ambient air to determine compliance with the
3 national air quality standards. We have ambient
4 air monitoring stations throughout the state, and
5 there are state employees that work out of Albany
6 supervised by Larry Sitzman that maintain those
7 facilities.

8 Q. Okay. You mentioned that name Larry Sitzman,
9 so he worked out of Albany now?

10 A. Correct.

11 Q. Was he formerly in the Region 9?

12 A. Larry Sitzman was the RAPCE before me.

13 Q. All right. So prior to becoming RAPCE in
14 November of 2010, what were your duties and your
15 position at the DEC?

16 A. Prior to RAPCE, I was Environmental Engineer 2
17 doing the inspections, enforcement, and permitting
18 of major facilities in Erie County.

19 THE COURT: Mr. Carlacci, move the
20 microphone just a little bit away from you.

21 THE WITNESS: It's too loud?

22 THE COURT: It's not that it's too loud.
23 I think it's the consonants that you hit kind of
24 distort.

25 THE WITNESS: You tell me when I'm right

1 on.

2 BY MR. MANGO:

3 Q. Okay. So in terms of the -- the time frame,
4 what's the time frame you worked as a -- I think
5 you said Environmental Engineer 2.

6 A. Environmental Engineer 2. I was promoted to
7 EE2 around 1989 until 2010 when I was promoted to
8 RAPCE.

9 Q. Okay. And did you have any supervisory role in
10 that time period?

11 A. Yes. I supervised a variety of staff. I was
12 also coordinator of many of the programs that are
13 coming along, such as new source performance
14 standards that were --

15 THE COURT: Slow down a little bit.

16 THE WITNESS: Such as new source
17 performance standards that were coming out of the
18 federal government relatively quickly. I was like
19 the keeper of the NSPS standards so that, you know,
20 I could give them like a bulletized version of each
21 NSPS. I also was --

22 THE COURT: Slow. Slow. Slow.

23 THE WITNESS: I also was responsible
24 for --

25 THE COURT: Take a breath. Take a breath.

1 Okay. Hold on.

2 Okay. Ask a question, Mr. Mango.

3 BY MR. MANGO:

4 Q. Yes, your Honor. Did you have any other type
5 of office coordination duties?

6 A. Yes. I was in charge of the nitrogen oxide
7 regulations that were being written to control acid
8 rain as well as smog, lower atmospheric smog.
9 Those regs were being updated relatively quickly
10 during that period. I was the disseminator of
11 information in the office.

12 Q. Okay. Now you may make some comments I need to
13 come back to. You said regs now a couple times.

14 A. Regulations.

15 THE COURT: Okay. And RAPCE, one more
16 time, is regional air pollution control engineer,
17 is that correct?

18 MR. MANGO: Yes.

19 THE WITNESS: That's correct.

20 THE COURT: Okay.

21 BY MR. MANGO:

22 Q. And essentially in that position you are the
23 top personnel in the air department in Region 9?

24 A. In the Division of Air in Region 9, correct.

25 Q. Who is above you? Who do you report to?

1 A. There is a regional engineer in the region that
2 supervises all the divisions, and I report to him.
3 And then above him is the regional director.

4 Q. Okay. Let's talk about the other divisions.
5 So there's one regional engineer you said who
6 oversees different divisions. Why don't you tell
7 the jury -- you're in charge of one of the
8 divisions.

9 A. I'm in charge of Division of Air. There is a
10 Division of Water. There is a Division of
11 Hazardous Waste and Materials Management. There is
12 a Division of Fish and Wildlife. There is a
13 Division of Environmental Permits.

14 THE COURT: Back up a little bit, okay, on
15 your microphone. The decibel level is good, but it
16 gets distorted, especially when you approach the
17 Ps. Go ahead.

18 MR. MANGO: Yes.

19 BY MR. MANGO:

20 Q. So Division of Water, Division of Fish and
21 Wildlife, Division of Hazardous Waste --

22 A. Hazardous Waste and Materials Management.

23 Q. Okay. And --

24 A. Where was I? The Division of Environmental
25 Permits.

1 Q. Okay.

2 A. I think we got them all there.

3 Q. Okay. And then there is a regional engineer
4 who supervises you and all the other heads of the
5 divisions. And there is a regional director?

6 A. Regional director, correct.

7 Q. Each region has its own regional director?

8 A. Correct.

9 Q. Okay. There is a number of items you've
10 discussed that we'll come back to when we start
11 talking in detail about the Clean Air Act. You've
12 already mentioned a couple items that I think we
13 need to -- we'll need to focus in on.

14 But you talked about the nitrogen oxide and
15 acid rain. Why don't you tell the jury a little
16 bit more in detail about what your role in that
17 program was.

18 A. As we were updating regulations, we do see the
19 limit from nitrogen oxide from stationary
20 combustion sources there were -- you know, guidance
21 out on how you measure it, what emission factors to
22 use, you know, how to write appropriate conditions.
23 You know, gathering the list of the sources that it
24 would apply to. That's the information I was
25 dealing with in that program.

1 Q. Is there something called a Division of Air
2 Resources Technical Support Workgroup?

3 A. There is a division -- yes, technical support
4 workgroup was established probably 15 years ago.
5 And it was basically to bring the nine regions
6 together. There was issues in each of the nine
7 regions had similar issues and some that were not
8 so similar. There was a lack of communication, so
9 this technical support workgroup --

10 MR. PERSONIUS: Your Honor, pardon me.
11 I'm sorry to interrupt. This is what I'm concerned
12 about, Judge. I object.

13 THE COURT: Yes. You're going to have to
14 tailor the questions. I'll sustain the objection.
15 I mean, I'll give you some leeway in latitude,
16 because as I view this, this is the qualification
17 of the witness.

18 I'll permit a lot of this under 104(a). But,
19 you know, make it -- if you break it down, it's
20 going to be easier for the jury to get started.
21 And maybe as we go along things will change. But
22 do it more deliberately.

23 MR. MANGO: Yes, your Honor.

24 BY MR. MANGO:

25 Q. This Division of Air Resources Technical

1 Support Workgroup, were you involved in that?

2 A. Yes.

3 Q. What was your role?

4 A. I represented the Region 9 office.

5 Q. And how long did you do that?

6 A. For several years.

7 Q. And this is while you were working as an
8 environmental engineer 2?

9 A. Correct.

10 Q. And what were some of the things you discussed
11 with the members from the other regions?

12 A. Discussed with members of the other region as
13 well as Albany central office was the regulations,
14 interpretation of the regulations, permitting
15 issues with writing permits, the mechanism of
16 delivering a permit from our computer system,
17 things of that nature. Developing guidance for
18 staff so that they can could their jobs
19 appropriately.

20 Q. Okay. So that guidance, would you then pass it
21 on anywhere?

22 A. Exactly. We shared with all the staff.

23 Q. As an environmental engineer 2, did you engage
24 in any type of permit review, inspection, or
25 enforcement?

1 A. Yes. I was responsible for several Title V
2 facilities in Erie County. I was involved with at
3 least 50 or so state facility permit applications.
4 I did quite a few registrations, which is the
5 simplest of permitting we do. And I handled
6 complaints.

7 Q. Okay.

8 A. Roughly did three or so inspections a week.
9 Fifty to a hundred a year.

10 Q. All right. Can you tell the jury -- you
11 mentioned this Title V facility. Might as well
12 just briefly tell the jury, if you could, what do
13 you mean by Title V?

14 A. In the Clean Air Act of 1990 it established --
15 it was 11 titles, and one of the titles was Title V
16 that established a permitting program that would be
17 applied through all the states in the United
18 States. Kind of leveled the playing field as to
19 what should be included in a permit. Up until then
20 each state had their own way of doing a permit and
21 what was required in the permit.

22 The Title V title also defined what was a major
23 facility, one that required to have a Title V
24 permit. Those facilities that emitted a nitrogen
25 oxide, a sulfur dioxide, a particulate, or carbon

1 monoxide, any one of those pollutants at a rate
2 over a hundred tons per year would be considered a
3 Title V facility. One that emitted over 50 tons
4 per year of a volatile organic compound would be
5 considered a major facility, one that required a
6 Title V permit.

7 It's a significant permit that requires a
8 certification by the facility that they're in
9 compliance with all the requirements that are
10 codified in this -- this permit that they would do
11 semi and annual reports.

12 THE COURT: Okay. Hold on. I'm going to
13 stop you right there. Just for the jury's
14 enlightenment, if you will, the first 15 counts of
15 the indictment relate to alleged violations of
16 Title V permit requirements.

17 MR. MANGO: Yes.

18 THE COURT: All right. Go from there.

19 BY MR. MANGO:

20 Q. Yes, your Honor. We'll come back to Title V.
21 How many Title V facilities were you in charge of
22 as an environmental engineer 2?

23 A. Directly responsible was seven.

24 Q. Seven. Okay. Now, were you responsible for
25 any non-Title V facilities?

1 A. Yes. Approximately 30 to 45.

2 Q. And at all of those facilities you would do
3 inspections approximately two to three per week?

4 A. I was out in the field two or three times a
5 week. We would do Title V inspections at least
6 once a year. Depending what was going on at that
7 facility may go there more often.

8 Q. Can you describe the types of facilities, like
9 in -- just describe for them like what facilities
10 are you talking about?

11 A. The facilities I was responsible for was the
12 Huntly Power Plant. It's a steam-generating
13 facility that burns coal to generate electricity.
14 The Dunlop Tire facility located here in Tonawanda
15 that makes approximately 15,000 tires a day, very
16 large facility. The 3M Sponge plant. One of the
17 larger sponge plants probably in the world. DuPont
18 Yerkes facility, right in that same area. General
19 Motors, Tonawanda, the engine plant that's located
20 on that River Road strip also are some of those.

21 Q. Okay. And how about -- those are the Title V
22 facilities?

23 A. Correct.

24 Q. Why don't you give the jury an example of the
25 non-Title V facilities that you would inspect?

1 A. The Ford plant was a state facility permit I
2 believe that I've been to. The Thermal Foams makes
3 the foam for styrofoam cups, make the large boards,
4 that's a state facility permit. There's so many of
5 them they just don't come to mind right now.

6 Q. Okay.

7 MR. PERSONIUS: Your Honor, forgive me,
8 could we have a time frame that the witness is
9 referring to?

10 THE COURT: Sure. Set the time frame with
11 your next question, please.

12 MR. MANGO: Sure, your Honor.

13 BY MR. MANGO:

14 Q. You were discussing inspections that you
15 conducted as an environmental engineer 2?

16 A. Correct.

17 Q. You were, again, you served in that roll from
18 when to when?

19 A. From 1989 till November 2010.

20 Q. Prior to that, so prior to 1989, did you hold
21 any other positions with DEC?

22 A. I was an environmental engineer 1.

23 Q. And what were some of your duties as an
24 environmental engineer 1?

25 A. Very similar to environmental engineer 2. More

1 supervision, not to that degree of capability as an
2 EE2.

3 THE COURT: Say that again, please.

4 THE WITNESS: I didn't have the same
5 expertise as an EE2. I had more supervision, less
6 significant sized companies or issues to deal with.

7 THE COURT: Okay. So 1 and 2, the
8 difference is you had had more supervision duties
9 and responsibility in 1, but the basic job duty
10 requirements were similar?

11 THE WITNESS: Very similar.

12 BY MR. MANGO:

13 Q. And how long did you serve as an environmental
14 engineer 1?

15 A. From when I started in September 1979.

16 Q. Up to 1989?

17 A. Till 1989.

18 Q. What caused you to be promoted from
19 environmental engineer 1 to environmental engineer
20 2?

21 A. You're required to have a professional
22 engineers license to be an EE2.

23 Q. So you did obtain a professional engineer
24 license?

25 A. Correct. I did in 1988.

1 Q. All right. In what state?

2 A. New York State.

3 Q. In terms of the promotion from environmental
4 engineer 2 to the regional air pollution control
5 engineer, is that known by another -- environmental
6 engineer 3 for example?

7 A. Environmental engineer 3, yes.

8 Q. What went into your promotion from
9 environmental engineer 2 to environmental engineer
10 3?

11 A. You had to take an exam. You were ranked, and
12 you went through an interview process as well as a
13 written submission of your abilities.

14 Q. Okay. That exam -- who puts that exam on?

15 A. New York State.

16 Q. You took that exam?

17 A. Yes, I did.

18 Q. When did you take that exam? I took it
19 numerous times. I think three, four times.

20 A. Once every couple years during 2000, 2005 in
21 that era.

22 Q. Okay. And then what's the next step of the
23 process? You mentioned you have to interview?

24 A. Right. They interviewed the top three
25 candidates and then choose one.

1 Q. Is this when Larry Sitzman left, this position
2 opened up?

3 A. Correct.

4 Q. Okay. So you interviewed for that?

5 A. Yes, I did.

6 Q. Who did you interview with?

7 A. With Abby Snyder and James Strickland. Abby
8 Snyder is the regional director. Excuse me, Abby
9 Snyder and Mark Hans.

10 Q. And Mark Hans, what's his role?

11 A. He's the regional engineer for the hazardous
12 materials division.

13 Q. And after taking that exam and then after going
14 through that interview process, did you say there
15 was a written component?

16 A. It was part of the grading along with the exam.

17 Q. And then you obviously were given that
18 promotion?

19 A. Yes, I was.

20 Q. Can you tell the jury about your education? Do
21 you have any undergraduate degrees?

22 A. I have a B.S. degree in civil engineering from
23 the University of Buffalo. I have my professional
24 engineers license. I took additional courses -- in
25 air pollution there's no -- back in 1979 there was

1 no degree for air pollution. So most of it is
2 on-the-job training as well as taking courses that
3 are put on by organizations in air pollution. So I
4 took a lot of courses during my career at DEC such
5 as those for controlling particulate emissions, or
6 controlling gaseous emissions, or design of boilers
7 and control of nitrogen oxide emissions.

8 Q. We will talk about some of those pollutants you
9 just mentioned in a little bit. As in your -- what
10 year did you graduate from UB?

11 A. 1979.

12 Q. All right. And obviously you had to take
13 courses in engineering to get that degree?

14 A. Correct.

15 Q. And I think you were just talking about some
16 continuing education you were involved in?

17 A. Yes.

18 Q. All right. Did you hold any certifications or
19 seek any certifications to help you do your job as
20 an inspector?

21 A. Only through the education I got at the state
22 through these training courses, as well as opacity
23 training, which you get certified to read opacity
24 from a stack. That's a form of certification.

25 Q. Tell the jury what you mean opacity stack.

1 This is all foreign to them, please, so just break
2 it down for them.

3 A. Out of a stack if you have air pollution, it
4 usually comes out of a stack. It could be smoke
5 associated with that. And opacity -- opacity is
6 the measure of light that transmits through that
7 smoke. Zero percent opacity means that there is no
8 smoke in it. A hundred percent opacity would be
9 totally dark obscuring the light coming through
10 that smoke. There is a method of reading that
11 opacity as to how -- the sunlight is behind your
12 back so that it doesn't cast a shadow.

13 And there is a procedure of getting certified
14 that you do once every six months. And that
15 certification allows you to read opacity, document
16 a violation. There's standards. For example,
17 20 percent opacity is a standard over a six-minute
18 period. Below that would be acceptable, above
19 would not. And that would hold up in a court of
20 law if you were certified to read opacity.

21 Q. Okay. A lot there. We'll get back to that as
22 well. In terms of -- do you know a person by the
23 name of Mark Kamholz?

24 A. Yes, I do.

25 Q. How do you know that person?

1 A. Mark occasionally would be one of the
2 individuals that I'd see at opacity school to get
3 certified. He also works at Tonawanda Coke.

4 Q. Do you see Mark Kamholz here in the courtroom?

5 A. Yes, I do. Mark is sitting right there.

6 MR. MANGO: Your Honor, may the record
7 reflect identification of the defendant?

8 THE COURT: Okay. Describe something he's
9 wearing, please?

10 THE WITNESS: Red tie. Blue shirt.

11 THE COURT: Okay --

12 THE WITNESS: Back row before the --

13 MR. PERSONIUS: We will stipulate to it,
14 Judge, if it helps.

15 THE COURT: All right. I won't accept the
16 stipulation. The identification has been made. It
17 will be noted for the record. I take it there's no
18 objection?

19 MR. PERSONIUS: No, your Honor.

20 THE COURT: Go forward, please.

21 MR. MANGO: Thank you, your Honor.

22 BY MR. MANGO:

23 Q. And you've subsequently learned that he works
24 at Tonawanda Coke Corporation?

25 A. Right.

1 Q. And was there a time period when you met him at
2 the facility?

3 A. I met -- you know, I don't know exactly the
4 first time I met Mark. I've seen him at smoke
5 school and knew him there that he worked at
6 Tonawanda Coke. But I did meet him at the plant in
7 May of 2008.

8 Q. We'll get to that interaction at the plant.
9 Now, smoke school you mean is it this opacity
10 training?

11 A. This is this opacity training. It's put on by
12 a separate organization where anybody can register
13 to take the class. So there would be state
14 individuals, as well as those from industry.

15 Q. Now, you previously -- I think in your earlier
16 answers you mentioned an Air and Waste Management
17 Association?

18 A. Correct.

19 Q. Okay. Are you a member of that?

20 A. Yes, I am.

21 Q. Can you describe for the jury what that
22 association is and who it's composed of?

23 A. The association is a nonprofit organization
24 just to enhance our learning in the field of
25 environment and air and waste management. And it's

1 comprised of state employees, as well as industry
2 consultants, attorneys. And, you know, we do a
3 seminar that I was a major part of to raise funds.
4 The seminar was -- we would certify PE credits, PEH
5 credits for engineers, and it was a training
6 seminar. So the organization would get together,
7 have monthly meetings that usually were
8 educational.

9 Q. What do you mean by PE credits?

10 A. PEH credits. It's a certification that some
11 PEs have to take a certain amount of training per
12 year to maintain their PE license.

13 Q. I guess PE is what I'm getting at. What do you
14 mean by PE?

15 A. PE stands for professional engineer.

16 Q. Okay. Now, have you in the past ever testified
17 as an expert?

18 A. Yes, I have twice.

19 Q. All right. Why don't you talk about the first
20 proceeding if you can?

21 A. Back in the '80s I was doing inspections at
22 Bethlehem Steel, and I had documentation of waste
23 heat stack violations, and we took action against
24 Bethlehem Steel. It was in front of an
25 administrative law judge in the office.

1 The second time had to do with Wilson Great
2 Batch, a facility in Clarence that processed
3 hazardous waste, and it was -- involved a permit
4 action. And I testified on the -- on the permit.

5 Q. The Bethlehem Steel, you mentioned a waste heat
6 stack. Can you describe what you mean by the term
7 "waste heat stack"?

8 A. A waste heat stack is a stack that vents the
9 pollution from a battery, a coke oven battery.
10 Coke oven battery is a piece of equipment that --
11 that makes -- that processes coal into carbon.
12 Carbon is a fuel or an oxidizer in refining iron
13 ore used in smelters or blast furnaces.

14 Q. Okay. So the waste heat stack is a component
15 at a coke oven battery?

16 A. Correct. The waste heat stack -- after the
17 fuel is burned in the oven, it's exhausted out the
18 waste heat.

19 Q. Now, you mentioned obviously coke ovens. Have
20 you in your prior duties as EE1, EE2, and even as
21 your experience now as the regional air pollution
22 control engineer, putting Tonawanda Coke aside for
23 a minute, have you done any inspections at other
24 coke plants in the region?

25 A. Yes. When I first started in 1979 there was

1 quite a bit of steel industry in South Buffalo, and
2 I did inspections at Donner Hanna Coke. I think
3 two or three. The facility shut down relatively --
4 shortly after I started. And then at Bethlehem
5 Steel I may have gone there 20 or so times to do
6 inspections on coke ovens, and mainly was to
7 document opacity or door leaks or pushing emissions
8 from the operation of the battery.

9 Q. Okay. Bethlehem Steel, was that -- did that
10 have an additional industrial component present on
11 site in addition to the coke oven battery?

12 A. With every coke oven battery there's usually a
13 by-product plant. By-product plant takes the gas
14 that's distilled from the coal and processes it,
15 recovers any product that's useful, and then uses
16 it to reheat the battery or run -- operate a boiler
17 or generator.

18 Q. Okay. You briefly described -- can you just in
19 a little bit more detail describe the process of
20 making coke?

21 A. Coke -- a coke oven battery is comprised of a
22 series of batteries, and these are slots. They're
23 roughly 2 feet wide by 13 feet high by 40 feet
24 long. There's different sizes, but roughly that's
25 the general shape. There will be 60 or so in a

1 row, and they have flues in between each one. So
2 you're charging coal through lids into that slot
3 that have doors on either side. You're going to a
4 process of destructive distillation with no air in
5 this oven that operates at about a thousand to
6 1500 degrees centigrade to remove the impurities
7 from this coal so you end up with pure coke.

8 And that is the material that's collected in
9 these lanes that goes to the by-products side of
10 the plant to recover things such as benzene,
11 toluene, or xylene, and to clean the gas of
12 ammonia, sulfur, so that you can use it as a fuel
13 back in the battery or in the boiler.

14 Q. Okay. So that there is a gas that comes off
15 the coal as it's --

16 A. The gas is called coke oven gas. It's a known
17 carcinogen.

18 Q. Okay. And is there any other type of
19 pollution? You've mentioned the nitrogen oxides.
20 Is that involved at all in a coke oven facility?

21 A. Whenever you burn a gas, you form nitrogen
22 oxides, but the coke oven gas itself has tars,
23 polycyclic aromatic hydrocarbons, benzene, toluene,
24 xylene, has components such as that that are
25 removed from the gas stream so that you have more

1 of a gas that's combustible in a burner that would
2 burn clean.

3 Q. Okay. During your inspections at Bethlehem
4 Steel or Donner Hanna Coke, what was the focus of
5 your inspection?

6 A. My focus was on the battery itself and opacity
7 from pushing or leaks from charging holes and
8 doors.

9 Q. Let's stop there. Pushing, what do you mean
10 pushing?

11 A. Once that battery that I described, that oven,
12 that slotted oven, cooks for a certain amount of
13 time, you have to push the coal -- the coke now
14 that it's turned into coke, out of the battery.
15 And the doors are taken off, and a machine comes
16 along with a ram and actually forces the coke out
17 of that battery into a -- like a railcar that's
18 shaped like a dump truck. It has four sides, open
19 on the top. Coke falls in this railcar, and it
20 travels down to the quench tower.

21 As you can imagine, this coke now is glowing
22 red hot sitting in an oven for anywhere from 20 to
23 30 to 40 hours, and it has to be quenched, cooled,
24 so you can store it and pile it until you sell it.

25 Q. Okay. You said it's got to be cooled. How

1 does coke, red hot coke, get cooled?

2 A. It goes under a quench tower where it' deluged
3 with water to cool it. As it's going down you have
4 ash coming off. If it's not totally cooked, you
5 have other emissions coming of this coke. And the
6 cooling just knocks most of the particulate down in
7 a tower called a quench tower.

8 This tower is designed to take the steam away
9 from the railcar so the individual driving the
10 railcar is not, you know, swimming in steam. It
11 makes steam, but it also knocks down the
12 particulates generated from hitting it with water.
13 It's like putting out your barbecue grill. You get
14 ash coming off with that water once you hit that
15 coke.

16 In the quench tower there are baffles to help
17 minimize the emissions, to knock down the
18 particulates and give the particulates more time to
19 come in contact with water.

20 Q. You keep saying this word particulates. What
21 is that?

22 A. Particulates is a contaminant. It's a small
23 particle that in the air if you breathe in causes
24 health issues.

25 Q. All right. So --

1 A. So there is a national ambient air quality
2 standard for particulates.

3 Q. Also called particulate matter or P --

4 A. Also called PM. Particulate matter or PM.

5 Q. You mentioned your focus was on the battery,
6 and than you mentioned a couple terms that we just
7 talked about. Now why was your focus on the
8 battery at these coke plants?

9 A. The regulation that we were -- we were
10 enforcing was Part 214. It's a regulation for coke
11 ovens that requires -- you know, to minimize leaks
12 from a battery. And it had, you know, requirements
13 for doors, charging holes, pushing, opacity limits
14 for pushing, as well as opacity limits for waste
15 heat, and required baffles in quench towers.

16 Q. That's Part 214 of what? What are we talking
17 about?

18 A. That's part of the New York State Code of Rules
19 and Regulations.

20 Q. So it's the New York regulations?

21 A. Yes.

22 Q. And there is a part that's Part 214?

23 A. Correct.

24 Q. And how long has Part 214 been around?

25 A. I think it was initially written in the middle

1 '70s.

2 Q. In terms of Bethlehem Steel, did they ever have
3 problems with their opacity or emissions from the
4 pushing and the leaks that you were focusing on?

5 MR. PERSONIUS: Objection.

6 MR. LINSIN: Objection, your Honor.

7 Relevance.

8 THE COURT: I'm sorry?

9 MR. LINSIN: Objection. Relevance, your
10 Honor.

11 MR. MANGO: Your Honor, this is relevant
12 because this -- this is going to be a theme we hear
13 during the trial that DEC air inspectors were very
14 focused on the battery. And that's relevant to
15 this pressure release valve that's going to come
16 into play which is in the by-products unit.

17 THE COURT: I'll allow you to connect it
18 up.

19 MR. MANGO: Thank you.

20 THE COURT: Overruled.

21 BY MR. MANGO:

22 Q. Why was there an emphasis on the battery at
23 Bethlehem Steel?

24 A. The Part 214 reg covered the battery. It
25 didn't really focus on the by-product side of the

1 plant, because the by-product side of the plant
2 supposedly was a closed-loop system. If the coke
3 oven gas that's generated within the pipe is
4 sealed, there's no leaks, goes through the process
5 of being clean. Again in vessels and tanks that
6 are sealed, there will be no emission sources
7 there. So actually our 214 did not cover the
8 by-product side of the plant.

9 Q. Okay. So you weren't focused on that when you
10 went to Bethlehem Steel because there was no New
11 York regulation on that?

12 A. Correct.

13 Q. But did Bethlehem Steel have problems with
14 their leaks and their door -- the leaks on doors
15 and lids and pushing and charging?

16 A. Yes, it did.

17 Q. Okay. You've mentioned a couple times now this
18 Clean Air Act. Why don't you explain -- you
19 mentioned at least one in the 1970s, and then there
20 was -- when you were talking about Title V you
21 mentioned the 1990s. Why don't you tell the jury
22 just in very simple terms what the Clean Air Act is
23 and how many there are.

24 MR. LINSIN: Your Honor, objection. I did
25 not yet hear this witness proffered as an expert

1 for any purpose. And before he begins this type of
2 testimony, I would, for one, request permission to
3 voir dire, and then an express proffer as to his
4 area of expertise.

5 THE COURT: All right. Well, you're on
6 notice in terms of the area of expertise designated
7 in the pretrial submissions by the government,
8 which includes the Clean Air Act Title V permit
9 procedures. So, that's part of the qualification
10 you've already done, right?

11 MR. MANGO: Right, your Honor. I think I
12 need to at least get him to say that he understands
13 or knows what the Clean Air Act is before I call
14 him an expert in the Clean Air Act.

15 THE COURT: Yeah. I'm going to permit it,
16 so at this point overruled. You may go ahead.

17 BY MR. MANGO:

18 Q. Great. Why don't you explain your
19 understanding of the Clean Air Act.

20 A. Okay. There were quite -- there was several
21 Clean Air Acts. It started in 1955 as research to
22 develop the national ambient air quality standards.
23 In 1970 it enabled -- U.S. Congress enabled EPA to
24 write national ambient air -- to develop --

25 THE COURT: Slow down. Take a breath.

1 No. No. Hold on. Question, Mr. Mango.

2 BY MR. MANGO:

3 Q. Yes. The 1990 -- or 1970 Clean Air Act that
4 you just mentioned, right?

5 A. Right.

6 Q. Okay. What was that designed to do, and what
7 were some of the tools in the Clean Air -- that
8 were put into place in the Clean Air Act?

9 THE COURT: I'm going to sustain the
10 objection. Let's find out what the Clean Air Act
11 is, then we'll find out if he has the expertise, if
12 you offer and there's no objection, to testifying
13 about attendant ramifications of the applications
14 relating to the clean act.

15 MR. MANGO: Yes.

16 BY MR. MANGO:

17 Q. Can you describe what the 1970 Clean Air Act
18 is?

19 A. The 1970 Clean Air Act empowered the EPA to
20 establish national ambient air quality standards,
21 new source performance standards, and national
22 emission standards for hazardous air pollutants.

23 Q. Okay. You mentioned three things there.
24 National ambient air quality standards?

25 A. Correct.

1 Q. What are those?

2 A. Those are ambient air quality standards to
3 protect public health.

4 Q. Okay. The next item you mentioned was a new --

5 A. New source performance standards.

6 Q. What are those?

7 A. Those are regulations that govern new
8 facilities.

9 Q. And the last one you mentioned?

10 A. National emission standards for hazardous air
11 pollutants. There were eight identified hazardous
12 air pollutants under the 1970 Clean Air Act, and
13 they wrote regulations to govern industries that
14 emit those contaminants, benzene being one of them.

15 Q. Benzene one was of the first eight?

16 A. Yes.

17 Q. Were there any additions to the Clean Air Act
18 or subsequent Clean Air Acts that you have
19 knowledge of?

20 A. There was one in 1977 that had to do with
21 prevention of significant deterioration. The
22 national ambient air quality standards were not
23 being met, so the U.S. Congress empowered EPA to
24 write additional regs, and they are codified in the
25 40 CFR Part 52, identified as prevention of

1 significant deterioration.

2 After that there was a Clean Air Act in 1990
3 that was even more empowering to the EPA that had
4 11 titles to it.

5 Q. Okay. One of which is that Title V you've
6 already mentioned?

7 A. Correct.

8 Q. Can you go through the different titles of the
9 1990 Clean Air Act?

10 A. Title I had to do with new source review in
11 attainment and non-attainment area, very similar to
12 PSD. It had requirements for those facilities that
13 went into areas that would hinder the compliance of
14 the national ambient air quality standards, regs to
15 that effect.

16 Title II had to do with mobile sources,
17 automobiles and trucks. It allowed EPA to write
18 regs to limit emissions from automobiles, such as
19 the on-board diagnostics that you have on all cars
20 now.

21 Title III had to do with hazardous air
22 pollutants. It identified 189 hazardous air
23 pollutants. It allowed EPA to write regulations
24 regulating source categories that emitted any of
25 those hazardous air pollutants.

1 After the regs were written and the control
2 technology was implemented at theses facilities
3 that emitted hazardous air pollutants, they did
4 risk assessment and were allowed to come back and
5 write additional regs if the risk was still not
6 acceptable.

7 Title IV had to do with acid rain. It
8 regulated major sources of sulfur and nitrogen
9 oxides, such as very large boilers and power
10 plants.

11 Title V was the permitting program that I
12 discussed earlier.

13 Title VI had to do with enforcement. It
14 stipulated how enforcement would be handled at
15 Title V facilities.

16 Title 7 had to do with stratospheric ozone
17 depletion. It's the ozone layer. It eliminated
18 production of chlorofluorocarbons and
19 hydrochlorofluorocarbons.

20 Title VIII was a miscellaneous title.

21 And Title IX, X, and XI had to do with
22 disadvantaged business, employment, and there was
23 one other I can't recall.

24 Q. Okay. All right. Before we go into Title V,
25 let's just quickly cover, is there any -- you've

1 mentioned Part 214 under the New York Code Rules
2 and Regulations. Is there another part that also
3 assists you in doing your duties as a state air
4 inspector?

5 A. There's several parts, but Part 201 is key in
6 defining our permitting process and exempt
7 activities.

8 Q. Okay. How long have you worked with the
9 various parts under the New York regulations?

10 A. Since I started Part 201 was key.

11 Q. Okay.

12 MR. PERSONIUS: Pardon me, your Honor.
13 Could we have the title of the CFR that we're
14 referring to? Or the New York Code. I'm not sure
15 what title we're talking about. We're talking
16 about parts, but --

17 THE WITNESS: This is Chapter 6 of the New
18 York State Code and Rules and Regulations, Part
19 201.

20 MR. PERSONIUS: Thank you.

21 MR. MANGO: Your Honor, before we go into
22 a discussion of Title V, at this point based on
23 this witness's qualifications, his experience, his
24 education, his employment, the government would
25 proffer this witness as an expert in the area of

1 the Clean Air Act, and in particular to discuss
2 Title V of the Clean Air Act, requirements under
3 Title V, and requirements at coke oven batteries.

4 THE COURT: Okay. Yes, Mr. Linsin?

5 MR. LINSIN: Your Honor, may I ask the
6 witness a couple of questions?

7 THE COURT: You know, I'm not going to
8 permit that. There were discussions relative to
9 this witness's testimony.

10 His testimony, ladies and gentlemen, I will
11 tender him -- or accept the tender of Mr. Carlacci
12 as an expert as defined by the prosecutor by virtue
13 of knowledge and experience and education, skill in
14 the field, training, and the like.

15 I'm going to allow cross-examination of the
16 qualifications of this witness. When you have
17 both, okay, when you have the cross-examination and
18 the direct examination, then you can determine from
19 the testimony when it's complete what weight, if
20 any, to give to this particular witness's
21 testimony.

22 And remember, you determine credibility. The
23 expertise of the witness as it relates to the Clean
24 Air Act, and specifically Title V, was discussed by
25 the attorneys for purposes of testimony here today

1 in advance of trial. And that's the permit
2 procedures. I'm going to allow that.

3 But you assess the credibility and the
4 believability of this witness just as you would any
5 other witness. It's just that the technicalities
6 that have been referenced and may be necessary to a
7 complete understanding, which you may not have, you
8 may choose to rely on this witness's expertise.

9 So I'm going to permit it subject to
10 cross-examination for purposes of the weight that
11 this jury is to afford to his testimony.

12 You may proceed, Mr. Mango.

13 MR. MANGO: Thank you, your Honor.

14 THE COURT: And the proffer I think is
15 pursuant to 702, right?

16 MR. MANGO: Yes, your Honor.

17 THE COURT: Okay.

18 BY MR. MANGO:

19 Q. Okay. Let's dive into Title V of the Clean Air
20 Act. Explain -- first let's explain in general
21 terms what Title V was designed to do.

22 A. Again, each state had their own mechanism of
23 writing a permit and what was included in a permit.
24 So Title V required that all states have certain
25 elements in a permit so that it was uniform

1 throughout.

2 And the Title V permit -- you know, all the
3 conditions had to be in the permit. You had to
4 have a good description of the facility, all the
5 required regulations specified in the permit, and
6 compliance assurance monitoring for any of the
7 parameters that were of significance.

8 Along with that it required that the facility
9 managers submit reports such as semi and annual
10 reports that documented compliance with the permit.
11 If there was a deviation, they would document that
12 in the annual compliance report. Semi-annual
13 reports are submitted documenting compliance with
14 the permit, unless there was an issue that they
15 would identify in that annual report.

16 Q. Okay. So you just went through a couple items
17 there. Let's break that down. Compliance
18 assurance monitoring, what do you mean by that?
19 Tell the jury.

20 A. Compliance assurance monitoring in a sense is a
21 term used for significant sources. But each
22 operation or process, you know, for example would
23 have some method of demonstrating that it was
24 meeting that standard. And you would require them
25 to check it. For example, if it was a bag house

1 and there was a pressure gauge to determine there
2 was no leaks in the bag, you would require them to
3 do a weekly checks of that magnetic reading.

4 Q. What do you mean bag house?

5 A. A bag house is a piece of control equipment
6 that filters out particulates from the air. From
7 actually the source.

8 Q. Okay. So it's --

9 THE COURT: That's a bag house?

10 THE WITNESS: I call it a bag house.

11 THE COURT: Is that one word, two words?

12 Is it B-A-G?

13 THE WITNESS: Yes, B-A-G. Two words.

14 THE COURT: Thank you.

15 BY MR. MANGO:

16 Q. So the emissions are captured into this bag?

17 A. It's ducted, you know, with hooding from a
18 process going into a bag house to filter out the
19 particulates before you exhaust clean air, just a
20 simple example.

21 Q. That's an example of compliance assurance
22 monitoring. Now you mentioned some annual
23 certifications and semi-annual certifications that
24 need to be made?

25 A. Right.

1 Q. What -- what are those? Just in general terms.

2 A. Those are a summary of the permit requirements,
3 and an identification of the monitoring that was
4 required for that condition, along with a statement
5 that you were either in compliance or out of
6 compliance. That would be identified as a
7 deviation.

8 If it was out of compliance, you would have a
9 description as to what occurred and how you
10 corrected the problem.

11 Q. Are these requirements that Title V imposed on
12 air emission sources?

13 A. It was part of the permit, right. That's what
14 Title V required you to also have in that permit
15 program.

16 Q. Okay. So was there an equivalent type of
17 annual or semi-annual compliance certification
18 requirement prior to Title V?

19 A. No, there was not.

20 THE COURT: What is the enactment date of
21 Title V?

22 THE WITNESS: Title V -- I mean, it was
23 started in the 1990 Clean Air Act. We put it into
24 our Part 201, into the SIP, and got interim
25 approval in 1996, final approval I believe in 2000,

1 2002.

2 BY MR. MANGO:

3 Q. Okay. You mentioned SIP. Can you --

4 A. State implementation plan. It's the plan that
5 the state has to meet the requirements of the
6 federal government, and the federal government
7 approves that plan.

8 Q. Okay. How does Title V -- how does Title V
9 actually work? You've mentioned a permit. What
10 needs to go into this permit?

11 A. You fill out an application. A facility fills
12 out at application and describes their facilities,
13 identifies all of the emission points in certain
14 ways using emission units, emission sources, and
15 estimates the emissions. Actually does an emission
16 estimate. Submits -- lists all the requirements,
17 regs that apply, whether they be federal or state,
18 in an application with the mechanism of how they're
19 going to monitor compliance for each of the regs
20 that apply. And that's an application.

21 Comes into the office. We write a permit that
22 has that same information into a form that looks
23 like a permit.

24 Q. Okay. So, you're talking about in New York
25 State, you would get an application, right?

1 A. Right.

2 Q. What types of information would come with an
3 application for a Title V permit?

4 A. It would be a plan of the facility, diagrams
5 that showed where equipment is located, and so on.
6 It would have emissions calculations supporting the
7 emissions listed in the application.

8 Q. Okay. And in New York State -- we'll get down
9 to that in a minute. For some of these Title V
10 facilities, was there a history already with them?

11 A. Yes. Before the Title V program we had our own
12 form. It was a form for each stack or emission
13 point. Called an Air 100.

14 Q. So you mentioned now -- so who actually
15 implements Title V in New York State?

16 A. New York State does. New York Department of
17 Environmental Conservation.

18 MR. LINSIN: Objection, time frame,
19 please.

20 BY MR. MANGO:

21 Q. After you received -- I think you mentioned
22 in 2001 or 2002 there was final approval.

23 A. Right.

24 Q. After that time period, once New York obtained
25 final approval, who implements Title V in New York

1 State?

2 A. In the region the region does.

3 Q. What division?

4 A. The Division of Air Resources.

5 Q. Your division?

6 A. Correct.

7 Q. Now, does New York State have in somewhere --
8 you've mentioned this 6NYCRR, the New York Code
9 Rules and Regulations, Title 6. Is there anywhere
10 in there that discusses Title V?

11 A. In Part 201 details the Title V requirements.

12 Q. Okay. So is that like your blueprint for how
13 to implement the Title V program?

14 A. Yes, it is. It describes -- initially when we
15 started the program in 1996, it detailed when an
16 application was due. It details what's required to
17 be in an application. It details how you submit a
18 for a permit modification.

19 Q. All right. And do you know if there's a
20 specific section in 201 -- 6 NYCRR 201 that deals
21 with Title V?

22 A. 201-6 that deals with Title V.

23 Q. What does 201-6 set out? Why don't you tell
24 the jury what's in there.

25 A. The requirements for submitting a Title V

1 application.

2 Q. I think you mentioned this. There's certain
3 criteria or certain --

4 A. Well, it defines what a Title V facility would
5 be --

6 THE COURT: No, hold on. Question.

7 MR. MANGO: Yes, sorry, your Honor.

8 BY MR. MANGO:

9 Q. Is there some type of mechanism in this 6 NYCRR
10 Subpart 201-6 that defines what is a Title V
11 facility?

12 A. Yes, in the definition section it will define a
13 major facility that's subject to Title V
14 requirement.

15 Q. What is that? What makes a facility a Title V
16 facility?

17 A. The amount of emissions that they put out into
18 the atmosphere. In the examples I gave earlier of
19 the 100-ton threshold exceeded for any of the
20 pollutants such as particulates, nitrogen oxides,
21 sulfur dioxide, carbon monoxide, if any of those
22 are over 100 tons emissions into the atmosphere
23 from all of the sources at the facility, it's a
24 Title V facility, as well as either/or, either of
25 those contaminants as well as either 50 tons of a

1 volatile organic compound, or 25 tons per year of
2 total hazardous air pollutants as defined under
3 Title III of the Clean Air Act, or 10 tons of any
4 individual hazardous air pollutant.

5 Q. What other sections are there in this Part 201?

6 A. There's a section for state facility permits,
7 which is 201-5, and those that are not Title V that
8 wish to limit their emissions below that threshold
9 can obtain a state facility permit.

10 There is a Section 201-4 for those that are --
11 are minor sources can apply for registration. And
12 then in 201-3 identifies those sources, those
13 emissions that are exempt or trivial.

14 Q. Okay. You used that, so let's talk about that,
15 exempt or trivial. So there's a specific section
16 that deals with that?

17 A. Right. Identified particular processes or
18 operations that were -- were small that didn't
19 reach the threshold that you needed to identify
20 them their permit application.

21 Q. Let me jump in here. Can you give me an
22 example of some of the exempt activities that are
23 in this -- what section is it again?

24 A. 201-3.

25 Q. Okay. 201-3, what are some of the exempt

1 activities, if you can give an example?

2 A. Exempt activities that are listed in there are
3 small combustion sources burning natural gas below
4 10 million BTU per hour. Handheld welding would be
5 exempt. Emissions for those types of sources would
6 have to quantify in that Title V facility, but
7 would not be necessary for a state facility or a
8 registration.

9 Q. Okay. Now you mentioned this word trivial,
10 what are some examples of trivial activities?

11 A. Trivial activities are like bathroom vents or
12 kitchen -- restaurant vents from cooking, as well
13 as another example is emergency relief vents.

14 Q. Okay. Let's talk about that, emergency relief
15 vent. So there's a specific trivial activity
16 that's listed in that Part 201-3?

17 A. Correct.

18 MR. LINSIN: Your Honor, with respect to
19 this particular regulation, I would ask that we be
20 clear as to what year -- this is a regulation that
21 has gone through a number of changes in the time
22 period under this indictment. What year are we
23 referencing with this testimony, please?

24 THE COURT: Okay. Your concern is the
25 exempt portion?

1 MR. LINSIN: 201-3, your Honor, yes.

2 BY MR. MANGO:

3 Q. The trivial activities portion. If you can
4 tell me what -- in terms of the trivial activities,
5 this emergency relief vent stack, what time period
6 are we talking about here?

7 A. In the reg?

8 Q. Yes.

9 A. The exempt and trivial activity was implemented
10 in our 201 right in that 1996 period when we were
11 defining Title V state facility and registration.
12 It has gone through some changes, but the list of
13 exempt and trivial activities really didn't change
14 much.

15 Q. Okay. So this emergency relief vent stack has
16 been there as long as -- how long has it been
17 there?

18 A. Since that rule was designed in that setup with
19 Title V state facility registration and exempt and
20 trivial, designed in that fashion in 1996.

21 Q. Okay. Now, you've mentioned your long history
22 of inspections. In your inspections have you ever
23 seen an emergency relief vent or stack in your
24 inspections?

25 A. Emergency relief vents are common in industry

1 where you're heating a medium, whether it be a gas
2 or a liquid, that's going to expand. You try to
3 prevent the pressure to a point that would cause
4 significant damage to that equipment, you know, if
5 you couldn't control it. An emergency, you know,
6 as it means, is used only for those that, you know,
7 are beyond design of the equipment. It occurs
8 because of unforeseen circumstances, catastrophic
9 event that that valve would go off, like an act of
10 God. It's not something that's common.

11 That type of vent, it's no different than on
12 your hot water heater. You have a vent there. If
13 you boil the water too hard, the burner doesn't
14 shut off you can have a catastrophic event on your
15 boiler. The valve would go off and allow the steam
16 to come out. That's an emergency relief vent.
17 It's not used frequently.

18 Q. That's your experience with energy relief vents
19 and stacks as a trivial activity?

20 A. Correct.

21 Q. Now do you know if the term "emergency" is
22 defined in Part 201 anywhere?

23 A. Yes. There is a definition of emergency in
24 Part 201.

25 Q. What's your understanding of the definition of

1 emergency?

2 A. As I just explained, it's for a -- if the
3 equipment is properly maintained and was designed
4 properly, and it's not something that's used as a
5 process, it's there to prevent a catastrophic
6 failure of equipment that -- that would be
7 considered an emergency, something that occurs in
8 that fashion.

9 Q. What about if you improperly use a device, or
10 if you improperly use a piece of equipment,
11 improper use, would that qualify as an emergency?

12 A. No.

13 Q. Operator error?

14 A. Operator error wouldn't be considered
15 emergency.

16 Q. Improperly designed equipment?

17 A. No, that would not qualify as a -- as an
18 exemption as an emergency -- excusable as an
19 emergency release.

20 Q. So in your position now as head of the air
21 division and in your time as an inspector, you've
22 seen emergency relieve vents and stacks that meet
23 this definition of an emergency and is a trivial
24 activity?

25 A. Correct.

1 Q. Okay. We'll get back to that. Now, you
2 mentioned state facility permits. What --
3 what's -- what goes into getting a state
4 emergency -- I'm sorry, a state facility permit?
5 How much less demanding is it than a Title V
6 permit?

7 A. A state facility permit is the same
8 application, same type of permit, and it's for
9 those facilities that do not want to be Title V, so
10 they're going to take a limit on their operation, a
11 limit in the emissions that they put out to stay
12 below those thresholds I mentioned earlier that
13 define a major source. And the conditions are more
14 stringent, depending how close you are to that
15 threshold. It still goes through a public notice,
16 and it doesn't require the same type of semi-annual
17 reports that a Title V facility does.

18 Q. Okay. That was Part 201. Now, there's Part
19 214 which you've already mentioned. And that -- in
20 there there's a discussion of quench towers, is
21 that right?

22 A. Yes, there is a standard there for quench
23 towers.

24 THE COURT: Are you talking about 214 now?

25 MR. MANGO: Now we're on Part 214, your

1 Honor.

2 BY MR. MANGO:

3 Q. Are you familiar with Part 214?

4 A. Yes.

5 Q. Okay. In your experience you've heard the term
6 a wet quench tower?

7 A. Correct.

8 Q. Okay. Again, describe that for the jury. What
9 is a wet quench tower?

10 A. A wet quench tower is when this railcar of coke
11 enters this station, this tower, you know, railcar
12 is in the bottom, water is sprayed on it to cool
13 off this coke. And the steam is carrying
14 particulates out with it. There's baffles in there
15 to prevent the particulates, as much as possible --
16 they're about 50 to 90 percent effective in
17 knocking the particulate out of this plume as it
18 goes into the atmosphere.

19 Q. Okay. You mentioned this term baffles. Part
20 214 says there has to be baffles?

21 A. Part 214 requires baffles in every quench
22 tower.

23 Q. You've been using this term "quench tower". Is
24 there a difference in the regulations anywhere
25 between a quench tower versus a quench station?

1 A. No.

2 Q. As long as -- let me ask you a question. As
3 long as incandescent hot coke is being deluged with
4 water in a structure, is it your understanding that
5 that structure has to have baffles?

6 A. Yes, it is.

7 Q. Okay. Now prior to Title V I think you
8 mentioned something called an Air 100?

9 A. Yes.

10 Q. Why don't you explain for the jury that system
11 that was used prior to Title V by New York State.

12 A. So Title V applications looked at the whole
13 facility and emissions coming from the whole
14 facility so you can evaluate those together.

15 THE COURT: Hold on one second. Are we
16 talking about 1996 now and before that, or 2002 and
17 before that? Which time period are we in?

18 BY MR. MANGO:

19 Q. Well, you obtained approval for your Title V
20 program 2001-2002?

21 A. We started implementing it in 1996. We had
22 interim approval in '96. Final approval in 2000,
23 2001. But we were doing Title V -- requesting
24 Title V applications right around the late 1990s.

25 Q. So the late '90s you start requesting Title V

1 permit --

2 A. Right.

3 Q. -- applications from facilities, right? But
4 those facilities, what -- what are they still
5 operating under?

6 A. They're operating under the state permit system
7 was called an Air 100, and it was a permit for each
8 stack at the facility. And that had the same type
9 of information that you would have in a Title V
10 permit. It had the emissions that were coming out
11 of that stack and described the process that
12 created those emissions, and gave you an
13 opportunity to write conditions that that covered
14 the reg that limited the emissions for that stack
15 in that process. And it was for each stack. That
16 was the state system before Title V.

17 Q. So, each emission --

18 A. Each stack, each mission point, had this Air
19 100 form.

20 Q. Okay. And then when Title V comes into play in
21 the late '90s, you mentioned you started
22 implementing Title V, right?

23 A. Right. We started requesting applications be
24 submitted based on the information we had on hand,
25 those facilities by SIC code had to submit an

1 application over a period of time. We staggered
2 the submission requirements based on SIC code, and
3 had to submit a Title V application.

4 Q. What is SIC code again?

5 A. Standard Industrial Classification code.

6 Q. Okay. So you had this information on file from
7 these Air 100s?

8 A. Yes.

9 Q. And then you notified the facilities that
10 needed to apply for a Title V permit?

11 A. Correct.

12 Q. Okay. Are you familiar -- let's now move to
13 the Tonawanda Coke Corporation. Are you familiar
14 with that facility?

15 A. Yes, I am.

16 Q. Do they have a Title V permit?

17 A. Yes, they do.

18 Q. Have you reviewed that Title V permit?

19 A. Yes, I have.

20 Q. Okay.

21 MR. MANGO: Your Honor, may I have a
22 moment?

23 THE COURT: Sure.

24 MR. MANGO: Your Honor, may I approach the
25 witness?

1 THE COURT: Yes.

2 MR. MANGO: Thank you.

3 BY MR. MANGO:

4 Q. Mr. Carlacci, I'm showing you what's been
5 identified as exhibit -- Government Exhibit 105.07.
6 What is that that you're looking at?

7 A. It's a photograph of the Tonawanda Coke
8 facility.

9 THE COURT: Before you go any further, why
10 wouldn't you use Elmo for everybody else's benefit?

11 MR. MANGO: I want to get it into evidence
12 first, your Honor. That stipulation that we had
13 entered into was just an -- I'm going to ask to
14 enter Exhibit 105.07 into evidence.

15 MR. LINSIN: No objection.

16 THE COURT: All right. So you can display
17 now if you want. You can publish.

18 MR. MANGO: Yes.

19 THE COURT: No objection?

20 MR. LINSIN: No objection.

21 MR. PERSONIUS: No objection.

22 THE COURT: Give us the exhibit number
23 205-1?

24 MR. MANGO: 105.07.

25 THE COURT: Must be listening to another

1 line --

2 (Government's Exhibit 105.07 was received
3 into evidence.)

4 BY MR. MANGO:

5 Q. There was a stipulation, Mr. Carlacci, I'll
6 tell you that this photo was taken on April 10th
7 of 2009. Okay. What are we looking at there?

8 A. This is right along -- here is River Road. You
9 can see the Grand Island Bridge right here.

10 MR. LINSIN: Your Honor --

11 THE COURT: Yes?

12 MR. LINSIN: If we could just ask the
13 witness to orient where he's pointing in the
14 photograph.

15 THE COURT: Yeah, we're going to have him
16 tap the screen and it will develop an arrow. Or
17 circle where you're testifying about. Does
18 everybody have this on your monitor? Okay.

19 Mr. Carlacci, circle the area or tap with
20 authority the screen, and you'll either get an
21 arrow, or if you need to circle something, you have
22 to do that with a full motion of the finger.

23 THE WITNESS: Okay. This is River Road,
24 Grand Island Bridge, the 190-290 interchange. NOCO
25 terminal, Sunoco terminal, Niagara River.

1 Tonawanda Coke.

2 THE COURT: All right. Where is Tonawanda
3 Coke? Circle that.

4 Not bad for the first try. Go ahead.

5 THE WITNESS: That's Tonawanda Coke.

6 MR. MANGO: Thank you. Your Honor, at
7 this point I'd also offer, which was part of the
8 stipulation, Government's Exhibit 305.07, which is
9 enlarged and cropped version of Exhibit 105.07.

10 THE COURT: Okay. I take it there's no
11 objection?

12 MR. LINSIN: No objection.

13 MR. PERSONIUS: No objection, Judge.

14 THE COURT: Okay. It will be received as
15 demonstrative evidence. No objection.

16 MR. MANGO: Thank you, your Honor.

17 (Government's Exhibit 305.07 was received
18 into evidence.)

19 BY MR. MANGO:

20 Q. Mr. Carlacci, is Exhibit 305.07 essentially a
21 version of what you're looking at here on the
22 screen?

23 A. Yes, it is.

24 Q. Okay.

25 MR. MANGO: Your Honor, at this point the

1 government would also offer Exhibit 105.42 into
2 evidence, which was subject to this stipulation.

3 THE COURT: Okay. Unless I hear an
4 objection, I will admit that. There's no
5 objection. Do you intend to publish?

6 MR. MANGO: Yes.

7 (Government's Exhibit 105.42 was received
8 into evidence.)

9 MR. MANGO: If we could please publish
10 that. Okay. So now what are we looking at on the
11 screen, Mr. Carlacci, Exhibit 105.42?

12 THE WITNESS: This is a closer look of the
13 Tonawanda Coke facility.

14 MR. MANGO: For demonstrative purposes I
15 would also offer Exhibit 305.42, which is part of
16 the stipulation as an enlarged version of 105.42.

17 THE COURT: For demonstrative purposes,
18 hearing no objections, 305.42 admitted.

19 (Government's Exhibit 305.42 was received
20 into evidence.)

21 BY MR. MANGO:

22 Q. Okay. Mr. Carlacci, if you'd like to look at
23 this photo, and at least describe some of the key
24 components at the Tonawanda Coke facility here by
25 using your touch screen. Or if you'd like, I have

1 a laser pointer if you'd rather do it on that
2 larger board.

3 A. I'll try to do it here. This area here I would
4 say is the coal fields. This piece of equipment
5 here that goes to this white stack right there is
6 the battery. And this is the by-product side of
7 the plant here, this area in the circle. This is
8 the ammonia still. The boiler house.

9 Q. Okay. All right. Now, in your position as
10 head of the air division, have you had a chance to
11 look through the air division's file for the
12 Tonawanda Coke Corporation, the Title V permit, and
13 any other permitting that was in place prior to
14 Title V?

15 A. Yes, I have.

16 Q. Are you aware of when operations began at
17 Tonawanda Coke facility under the name Tonawanda
18 Coke Corporation?

19 A. It was in the late '70s I believe.

20 Q. And when would a New York Stat DEC's oversight
21 have begun of the Tonawanda Coke Corporation?

22 A. We always had oversight at that facility.
23 Before it was Tonawanda Coke, once it became
24 Tonawanda Coke they -- they had to do their
25 permitting for that facility.

1 MR. MANGO: Your Honor, if may have a
2 moment?

3 THE COURT: Certainly.

4 MR. MANGO: Your Honor, may I approach the
5 witness?

6 THE COURT: Is there any objection to
7 publishing this?

8 MR. LINSIN: There is, your Honor.
9 Relevance. Relevance.

10 THE COURT: Okay.

11 MR. MANGO: Should I approach, your Honor,
12 and at least establish foundation?

13 THE COURT: Sure.

14 MR. MANGO: Thank you.

15 Mr. Carlacci, I'm going to show you Government
16 Exhibit 128 and ask you if you can just take a look
17 at that document.

18 THE COURT: All right. Why don't you pull
19 Elmo out, publish it on Elmo. It won't be
20 published for the jury and everybody would see it
21 on the monitors.

22 THE CLERK: Don't you have it on disk?

23 MR. MANGO: We do.

24 THE CLERK: That's the way it should be
25 done.

1 THE COURT: Lets do that, and we'll block
2 the jury until we get it qualified for you, ladies
3 and gentlemen.

4 MR. MANGO: Yes, your Honor. If we could
5 pull up 128, please.

6 BY MR. MANGO:

7 Q. Okay. What -- in general, what are we looking
8 at here?

9 A. This is a letter from Tonawanda Coke signed by
10 Mr. Crane.

11 Q. Okay.

12 A. The president at the time.

13 Q. Okay. I don't want to go into the details of
14 what this is yet until it's and if it gets admitted
15 into evidence. What is the date on this?

16 A. The date on it is November 17th, 1979.

17 Q. Okay. And where did this document that you're
18 holding come from?

19 A. Came from Tonawanda Coke.

20 Q. And where was it found?

21 A. It was found in our files in Region 9.

22 Q. Is this a document that is maintained in the
23 ordinary course of business by the New York State
24 DEC?

25 A. Yes, it is.

1 Q. Is it the regular practice of New York State
2 DEC to maintain this document?

3 A. Yes. We maintain all records submitted on an
4 air permit source.

5 Q. Is it the regular course of New York State DEC
6 to rely on this document?

7 A. Yes, it is.

8 Q. Would this document have been placed in --
9 there's a file that this came out of it?

10 A. Yes, there is. It's a file maintained in our
11 office.

12 THE COURT: Okay. Hold on. We're not
13 talking foundation, we're talking about relevancy
14 of the document itself?

15 MR. LINSIN: Well, yes. My earlier
16 comment went to relevancy. On its face, your
17 Honor, this is not a business record of DEC. This
18 is a business record of Tonawanda. I have no
19 objection on that basis. It's a relevancy issue.

20 THE COURT: Right. So, I mean, there's no
21 issue with respect to that it was a document kept
22 by DEC, so we're beyond that hurdle. But what's
23 the relevance? That's what we want to get to.
24 We're talking 1979 here by this document. So we
25 use that as a starting point to see if it's at all

1 relevant for purposes of this prosecution.

2 MR. MANGO: Yes, your Honor.

3 BY MR. MANGO:

4 Q. Mr. Carlacci, what is -- what is the subject of
5 this letter?

6 A. The subject of this letter is Part 214 and the
7 requirements.

8 Q. And what is being -- is there a request being
9 made in this letter?

10 MR. LINSIN: Objection, your Honor.

11 THE COURT: Well, it calls for a yes or
12 no. I can let that go.

13 MR. LINSIN: All right.

14 THE COURT: All right. Your answer is yes
15 or no?

16 THE WITNESS: Yes.

17 BY MR. MANGO:

18 Q. Let me go at it this way. Are you aware of
19 something called pushing controls?

20 A. Yes, I am.

21 Q. Okay. At a coke plant what are pushing
22 controls?

23 A. Pushing controls is control equipment that's
24 put on the pushing side of the battery. When the
25 coal is cooked into coke and pushed out of the oven

1 falling into that railcar, control equipment
2 controls the emissions that are created at that
3 point. Those are called pushing controls.

4 Q. Those are pushing controls. Did Bethlehem
5 Steel have pushing controls?

6 MR. LINSIN: Objection.

7 THE COURT: Relevancy?

8 MR. LINSIN: Indeed, your Honor, yes.

9 THE COURT: All right.

10 MR. MANGO: Your Honor, if I may make a
11 limited proffer here. I don't know if you want to
12 do this at side bar.

13 THE COURT: Do it concisely. What's
14 the -- what's the relevance whether or not
15 Bethlehem Steel has a pushing control?

16 MR. MANGO: Your Honor, Tonawanda Coke
17 facility is a facility that does not have pushing
18 controls. And to obtain that exemption to not have
19 pushing controls, they agreed to tighter standards
20 on their battery. And this is relevant because
21 then it controls, similar to what we talked about
22 before why Mr. Carlacci's focus at Bethlehem Steel
23 was on the battery, it was even more so for the DEC
24 air inspectors' focus on the battery, because they
25 got this pushing exemption from the pushing

1 controls, and they had to focus on the battery more
2 because it was tighter regulations.

3 THE COURT: But we're talking Bethlehem
4 Steel, and I think that's the problem here, right?

5 MR. LINSIN: We're talking about Bethlehem
6 Steel, that was the question pending, your Honor.
7 But, events in 1979, unless they are tied to
8 allegations in this indictment -- and there's no
9 allegation in this indictment that relates at all
10 to pushing controls or emissions for the oven for
11 that matter. And therefore we are objecting on the
12 grounds of relevance.

13 THE COURT: I'm going to -- foundationally
14 and relevance I'm going to sustain that objection.
15 I'll give you an opportunity to try to develop it,
16 but if you can't do it quickly, we'll move on.

17 MR. MANGO: Your Honor, thank you. This
18 letter relates to Tonawanda Coke.

19 THE COURT: Right.

20 MR. MANGO: During the defense counsel
21 opening there was this discussion of the regulatory
22 history at Tonawanda Coke. This is the start of
23 the regulatory history. I think this is -- the
24 government believes this is relevant, because
25 this -- this drives what the inspectors would then

1 be doing at Tonawanda Coke.

2 THE COURT: Well, I mean, that's your
3 argument, but you haven't established that through
4 the witness, so we'll see.

5 MR. MANGO: Okay. Mr. Carlacci, this
6 letter, what does -- is there a request being made
7 in this letter?

8 THE WITNESS: There is a request here that
9 pushing --

10 MR. LINSIN: Objection.

11 THE COURT: It calls for a yes or no
12 answer.

13 BY MR. MANGO:

14 Q. Is a request being made --

15 A. Yes, there is.

16 Q. -- in that letter. Did New York -- it's a
17 request for some type of waiver or an exemption?

18 MR. PERSONIUS: Object to the leading,
19 your Honor.

20 MR. MANGO: What type of request is it?
21 I'll rephrase, your Honor.

22 THE COURT: Okay.

23 BY MR. MANGO:

24 Q. What type of request, in general terms -- not
25 the specific details, in general terms what kind of

1 request is being made here?

2 A. It's a request for a variance of the
3 requirements in Part 214 for pushing controls.

4 Q. All right. Now, do you know if DEC granted
5 that request for a variance, yes or no?

6 A. Yes.

7 Q. Did they grant that request after receiving
8 this letter?

9 A. Yes.

10 MR. MANGO: Your Honor, the government
11 would offer again this letter as the foundation for
12 an exemption to Part 214 has been made by the
13 Tonawanda Coke facility.

14 THE COURT: All right. I take it there's
15 still an objection?

16 MR. LINSIN: There is, your Honor. I've
17 heard no testimony that relates this document in
18 any way to any of the allegations in this
19 indictment. It's a fundamental relevancy issue.

20 THE COURT: Well, yes and no. I mean,
21 there is background similar to the qualification of
22 a witness. This is background information I think
23 is what you're saying.

24 MR. MANGO: Yes, your Honor. This
25 establishes, starts the regulatory history at

1 Tonawanda Coke. And then it is also relevant to
2 subsequent air inspectors' inspections at the
3 Tonawanda Coke facility and the why the focus was
4 on the battery versus not on the by-products unit.

5 THE COURT: All right. I'm going to allow
6 you to do it. I'm going to overrule the objection.
7 However, if you don't connect it up, I will
8 entertain a motion to strike the testimony, and
9 also to, from the exhibit standpoint, withdraw the
10 exhibit from evidence. So, I'll do that.

11 With that though I think we're going to take a
12 break for about 15 minutes, and then we'll be going
13 today until about 4:45. So we'll take 15 right
14 now.

15 MR. MANGO: Yes, your Honor.

16 THE COURT: I'm entering it subject to the
17 further connecting up, and in the event of a motion
18 to strike the exhibit, I'll entertain that at a
19 later point.

20 (Government's Exhibit 128 was received
21 into evidence.)

22 (Jury excused from the courtroom.)

23 THE COURT: Okay. Mr. Carlacci you may
24 step down, and we'll resume again at 4:00 o'clock.

25 MR. MANGO: Yes, your Honor.

1 MR. PIAGGIONE: Thank you, your Honor.

2 (Short recess was taken.)

3 (Jury seated.)

4 THE COURT: Okay, welcome back, ladies and
5 gentlemen. Please have a seat. The attorneys and
6 parties are back, present. The jurors here, roll
7 call waived. We're back on in the case of United
8 States of America versus Tonawanda Coke Corporation
9 and Mark Kamholz. And on the witness stand is
10 first witness for the government, Alfred Carlacci.

11 Your witness, Mr. Mango.

12 MR. MANGO: Thank you, your Honor.

13 BY MR. MANGO:

14 Q. If we could please publish Exhibit 128. Okay.
15 Mr. Carlacci, I was asking you some questions about
16 Exhibit 128. In your role as the regional air
17 pollution control engineer for DEC, does DEC -- are
18 you responsible or oversee inspectors who do
19 inspections at Tonawanda Coke Corporation facility?

20 A. Yes, I do.

21 Q. Okay. And between the periods of 2005 to 2009,
22 you were not the regional pollution -- the regional
23 air pollution control engineer at the time, is that
24 correct?

25 A. Correct.

1 Q. Okay. But were you aware that inspectors did
2 inspections at the Tonawanda Coke facility
3 between 2005 and 2009?

4 A. Yes, I was.

5 Q. Okay. And during those inspections, what was
6 the focus of the inspections?

7 MR. PERSONIUS: Your Honor, I object
8 without a foundation as to how he would know that.

9 THE COURT: Yeah, sustained.

10 MR. MANGO: All right.

11 BY MR. MANGO:

12 Q. We'll move on. I'd like to show you
13 Exhibit 19.01 for identification purposes.

14 Okay. If we can zoom in on this portion,
15 please. Do you see this on the screen, Exhibit
16 19.01 for identification?

17 A. Yes, I do.

18 Q. What is this letter?

19 A. It looks like a letter that came out of our
20 files.

21 Q. And who did it come from?

22 A. Tonawanda Coke.

23 Q. Actually, if we can zoom out please, Lauren,
24 okay. Let's try to get this. And who signed it?

25 A. Mark Kamholz.

1 Q. And what is the date?

2 A. March 13th, 1981.

3 Q. What is the subject of this letter, or what's
4 the purpose of this letter?

5 MR. PERSONIUS: Your Honor, I object to
6 the purpose. I think subject matter might be more
7 appropriate than purpose.

8 THE COURT: Yeah. Sustained on that
9 basis.

10 MR. MANGO: What is the subject matter of
11 this letter?

12 THE WITNESS: The subject matter is the
13 flow diagram of the process after the exhauster.

14 MR. MANGO: Your Honor, the government
15 would offer Exhibit 19.01 into evidence.

16 MR. PERSONIUS: I object on relevancy
17 again, Judge, from 1981.

18 THE COURT: All right. Let's have that
19 argument again, or at least your position. Are you
20 connecting this up to something? Is this just part
21 of the history of the -- of the regulation
22 relationship with DEC?

23 MR. MANGO: Your Honor, this is even more.
24 This is a letter signed by Defendant Kamholz
25 enclosing a flow diagram for the gas flow after the

1 exhausters, which I may need to ask one more
2 question to tie this in. But that would be
3 essentially the by-products area. So this shows
4 that Defendant Kamholz has knowledge of the
5 by-products area, and obviously that's important to
6 this -- Counts 1 through 5, which relate to the
7 unpermitted pressure release valve.

8 THE COURT: Assuming you can connect that
9 into the period of time that's the subject of the
10 indictment, so -- any further comment?

11 MR. PERSONIUS: No, Judge.

12 MR. LINSIN: Your Honor, we do expect that
13 the evidence from the witnesses who will testify
14 relevant to the time period in this indictment will
15 say that the processes in by-products area and for
16 this coke oven gas line were adjusted and changed
17 over time. I fail to see the relevance to
18 something that is 24 years before the dates that
19 are relevant to the counts in this indictment.

20 THE COURT: I mean, it's certainly
21 attenuated is what you're saying, right?

22 MR. LINSIN: And no foundation, your
23 Honor, that this schematic that is the subject of
24 the letter bears any relevance to what -- the
25 conditions that existed at the plant.

1 THE COURT: Well, that's for step number
2 two. But I'm not going to admit the record. I'm
3 going to sustain the objection. But I will allow
4 you to add whatever question you think is necessary
5 to make the connect for further consideration.

6 MR. MANGO: Yes, your Honor, thank you.

7 Is there a discussion in this letter -- or let
8 me start again. Is there a title used on this
9 letter for Defendant Kamholz?

10 THE WITNESS: Yes, there is.

11 MR. MANGO: Okay. What title is used?
12 I'm sorry, let me -- that's not evidence yet.

13 MR. PERSONIUS: Your Honor, if that's the
14 -- we'll stipulate. We stipulated in our opening
15 that Mr. Kamholz was the environmental manager at
16 Tonawanda Coke.

17 THE COURT: But I think we're going beyond
18 that, right?

19 MR. MANGO: Yes, your Honor.

20 THE COURT: All right. So we'll take
21 the stipulation. I mean, there's no dispute that
22 that title applied back in 1981, and it's manager
23 of environmental control. Let's go from there.
24 The document is not in evidence.

25 MR. MANGO: Not in evidence, your Honor.

1 Is there a discussion of gas flow?

2 Is Defendant Kamholz discussing gas flow in
3 this letter?

4 THE WITNESS: Yes.

5 MR. MANGO: And based on your
6 understanding of this letter, what does the gas
7 flow relate to?

8 MR. PERSONIUS: Now he's asking him to
9 read from an exhibit not in evidence. I object to
10 it.

11 MR. MANGO: Your Honor, maybe I can start
12 again.

13 THE COURT: Please.

14 BY MR. MANGO:

15 Q. All right. In part of your duties as the
16 regional air pollution control engineer, do some of
17 the inspectors that you oversee inspect Tonawanda
18 Coke Corporation?

19 A. Yes.

20 Q. Do those inspectors have -- are they expected
21 now to have a knowledge of the by-products
22 department?

23 A. Yes.

24 Q. Okay. And again, explain what the by-products
25 department is for the jury, please.

1 A. The by-products -- part of a coke oven facility
2 is the part that would prepare the gas for use in
3 the ovens or the boiler and recover any -- any
4 items such as benzene, toluene, xylene, that's of
5 value in that gas, as well as remove tar from the
6 gas that's also a by-product.

7 Q. Okay. Is it important for your inspectors to
8 know how the gas is flowing in the by-products
9 department at Tonawanda Coke?

10 A. Yes.

11 Q. Okay. How do inspectors in your department get
12 that information for the gas flow?

13 A. By asking the plant.

14 Q. Okay. This letter that you're looking at, is
15 this information that came from the plant regarding
16 gas flow?

17 A. Yes.

18 Q. Is this relied on by you and your inspectors in
19 determining how the by-products operation works at
20 Tonawanda Coke facility?

21 MR. PERSONIUS: Objection. I'm sorry,
22 your Honor. I object, your Honor.

23 THE COURT: Grounds?

24 MR. PERSONIUS: No foundation.

25 THE COURT: Well, it's compound, because

1 it involved the inspectors and this witness, so on
2 that basis, on the form of the question, I'm going
3 to sustain it.

4 But we are dealing I think with respect to the
5 knowledge element of Counts 1 through 15, at least
6 setting it up. So, you tell me if there's further
7 objection on this. So, objection sustained. You
8 go forward at this point.

9 MR. MANGO: Yes, your Honor.

10 BY MR. MANGO:

11 Q. In a moment we're going to discuss -- have you
12 come to learn that there was something called the
13 pressure release valve at the Tonawanda Coke
14 Corporation?

15 A. Yes.

16 Q. Have you formed any opinions as to whether that
17 was compliant with the Title V permit or
18 noncompliant?

19 A. My opinion it's noncompliant.

20 Q. We'll, get there. Now, you formed that
21 opinion. In forming that opinion, did you need to
22 have an understanding of the gas flow at Tonawanda
23 Coke?

24 A. Yes.

25 Q. Okay. Is this a letter we're looking at here,

1 Exhibit 19.01, that assisted you in determining the
2 gas flow at Tonawanda Coke?

3 A. Really doesn't give you the information, a
4 complete picture.

5 Q. Okay. What does it give you?

6 A. This is the cover letter. That's all that's
7 here.

8 Q. Oh, yes. If I can show you for identification
9 purposes the second page of this exhibit. I guess
10 the third page, yes.

11 Okay. So this page, is this something you have
12 relied on in learning about the by-products
13 department at the Tonawanda Coke Corporation?

14 A. Yes. This is a simple diagram.

15 Q. It was sent to the New York DEC by who?

16 A. By Mark Kamholz.

17 MR. MANGO: Your Honor, the government
18 would offer now this into evidence as 19.01.

19 THE COURT: Well, I'm going to open it up
20 at the appropriate time, if counsel choose, to
21 cross-examination. But I'm going to admit it,
22 unless there's further argument on it. It's still
23 subject to relevancy. We're talking a long time.
24 We don't know if the conditions have changed or the
25 air flow system has changed in the ten years or so.

1 MR. LINSIN: And, your Honor, that is my
2 point. Without that foundation, I don't know how
3 we or the jury can assess relevance, and that is my
4 struggle with this document.

5 THE COURT: Well, I mean, there are --
6 there are some gaps, but there is that aspect of
7 how much weight you are going to choose to give to
8 this particular exhibit, ladies and gentlemen. The
9 attorneys will be able to argue to you if there's
10 nothing more.

11 I am admitting it for your consideration.
12 There will be more evidence to come. There's still
13 the opportunity to move to strike this particular
14 exhibit if there is no connecting between change of
15 circumstances between '81 and -- or not,
16 '81 and 2005, '6, wherever we want to go with it.

17 MR. MANGO: Yes, your Honor, thank you.

18 (Government's Exhibit 19.01 was received
19 into evidence.)

20 BY MR. MANGO:

21 Q. I'd ask this be published for the jury, and if
22 we can return to the first page. If we can just
23 focus in on that area please, Mr. Carlacci. Can
24 you read the second paragraph here, please?

25 A. "As you would expect, flow rates are completely

1 dependent on production levels. Any level of gas
2 flow currently being utilized will be modified in
3 the future as needed. However, a flow rate
4 measuring device is in place prior to the sampling
5 point."

6 Q. Okay. Now, this mentions that the gas flow
7 currently being utilized will be modified in the
8 future. So do you know, based on your review of
9 the file, if additional gas flow diagrams have been
10 submitted to the DEC?

11 A. I do not recall seeing any additional diagrams
12 in the file.

13 Q. Now, if we can go to the third page again,
14 please. Now, we're going to talk about, as I said,
15 a pressure release valve that you've come to learn
16 about at the Tonawanda Coke facility, is that
17 right?

18 A. Correct.

19 Q. Is that listed on this flow diagram?

20 A. No, it is not.

21 Q. Okay. I'd like to show you Government's
22 Exhibit 19.02 for identification purposes.

23 If we can focus in, please, Lauren, on this
24 area.

25 Okay. What are we looking at here,

1 Mr. Carlacci, in general terms please?

2 A. A letter out of our file.

3 Q. Okay. Dated when?

4 A. September 19, 1983.

5 Q. Okay. And it's sent by who? We need to zoom
6 out if we can.

7 A. Yeah, zoom out.

8 Q. If we could go to the next page. Who sent this
9 letter?

10 A. Submitted by Mark Kamholz.

11 Q. If we can go back to the first page. Is there
12 a discussion of quench tower number 1 in this
13 letter?

14 A. Yes, there is.

15 Q. And essentially is there a request being made
16 in this letter regarding quench tower number 1?

17 A. Yes, there is.

18 Q. Is there commentary being made as to how often
19 this quench tower number 1 is being used?

20 A. Yes, there is.

21 MR. MANGO: Your Honor, government would
22 offer 19.02 into evidence.

23 MR. LINSIN: No objection.

24 MR. PERSONIUS: No objection, your Honor.

25 THE COURT: Okay. 19.02 received, no

1 objection.

2 (Government's Exhibit 19.02 was received
3 into evidence.)

4 MR. MANGO: I ask that it be published for
5 the jury.

6 THE COURT: Okay.

7 BY MR. MANGO:

8 Q. Okay. Why don't you just tell the jury what
9 this letter is -- what Tonawanda Coke is trying to
10 convey to the DEC in this letter.

11 A. Written in 1983, it's a cover letter for the
12 submission of applications -- Air 100 applications
13 for the sources listed in the letter, the five
14 sources.

15 Q. Okay.

16 A. As well as a request on a change in operation
17 for the quench tower.

18 Q. Okay. If we can start -- so you mentioned
19 these applications for certificate to operate. Are
20 those these Air 100s you're talking about?

21 A. Yes.

22 Q. Okay. Number 4 and number 5 on the list here
23 is quench 1 and quench 2?

24 A. Correct.

25 Q. And then if we can start at the bottom, this

1 paragraph. If you can read that without zooming,
2 let me know. If you want it zoomed, let me know.

3 A. It states "Number 1 quench tower is used as a
4 backup unit, and as such, in service
5 intermittently -- only intermittently, i.e. about
6 10 percent of the time."

7 Q. Okay. If we can go to the next page, please,
8 Lauren. Lets zoom in here if we can.

9 Okay. Keep reading, please.

10 A. "The physical location of number 1 quench tower
11 within the plant is a great distance to plant
12 property lines, and hence, the dropping out of
13 almost all particulate occurs on plant property."

14 Q. Keep going.

15 A. "Number 1 quench as well as number 2 use once
16 through water only. Possible particulate
17 generation from increased solids in recycled water
18 is eliminated."

19 Q. Okay. And the final paragraph, please.

20 A. "The effect of number 1 quench tower not being
21 baffled is believed to be de minimus. The town of
22 Tonawanda is meeting ambient air quality
23 standards."

24 Q. So what -- now, if you can tell the jury, what
25 is this letter trying to convey to the DEC?

1 A. That number 1 quench tower is infrequently
2 used.

3 Q. Okay. Does it have or does it not have
4 baffles?

5 A. That it does not have baffles.

6 Q. All right. Now you mentioned there was some
7 Air 100s that were included with this letter?

8 A. Yes.

9 Q. I'd like to show you Exhibit 19.03 for
10 identification purposes. And absent an objection,
11 your Honor, I would simultaneously move this into
12 evidence as it relates to an Air 100 for quench
13 one.

14 MR. LINSIN: No objection.

15 MR. PERSONIUS: No objection, your Honor.

16 THE COURT: Okay. 19.03 received, no
17 objection.

18 (Government's Exhibit 19.03 was received
19 into evidence.)

20 THE COURT: Publish, please.

21 BY MR. MANGO:

22 Q. Okay. Maybe we can focus on the top half of
23 this document, please, and then we can move down.

24 Okay. So why don't you -- this is the first
25 Air 100 we're looking at. Why don't you tell the

1 jury, please, what this document is, how it's laid
2 out, what's this information that's on here.

3 A. This is the application form, also serves the
4 purpose of being the permit when it's completely
5 filled out, the form we used prior to Title V. On
6 the top it lists the name of owner, information on
7 the source, a description of the process, and an
8 estimate of emissions.

9 Q. Okay. And if we can scroll down on this.
10 Okay. Can you read the special conditions at the
11 bottom?

12 A. Yes, I can. "The emission point shall be
13 maintained as a standby unit. Use is limited to
14 less than 10 percent of total quenches. The
15 installation of baffles is not required due to
16 unreasonable cost and physical impairments.

17 Q. Okay. And this is signed by Mark Kamholz?

18 A. Yes, it is.

19 Q. So essentially what did this Air 100 put into
20 place for quench tower number 1 at Tonawanda Coke?

21 A. A limitation of use.

22 Q. If I can show you 19.04 for identification
23 purposes, but also simultaneously move it into
24 evidence, your Honor, as this relates to quench 2,
25 an Air 100.

1 THE COURT: Any objection?

2 MR. LINSIN: No objection.

3 MR. PERSONIUS: No objection, Judge.

4 THE COURT: Okay. 19.04 received, no
5 objection.

6 (Government's Exhibit 19.04 was received
7 into evidence.)

8 MR. MANGO: I ask that it be published to
9 the jury, and we can just focus on the bottom half
10 of this.

11 THE COURT: Okay. Publish please.

12 BY MR. MANGO:

13 Q. Okay. Now under special conditions, if you
14 can -- if you can read that?

15 A. "This emission point is regulated by Part --
16 appears to say 214.3, effective August 23rd, 1979.
17 This wet quench tower does have an approved baffle
18 system. Quench tower makeup water standard shall
19 be determined by the commissioner. The permissible
20 in box 62 is a proposed standard."

21 Q. Is it fair to say, in essence, this exhibit
22 19.04 is saying that there is baffles and there
23 needs to be baffles in quench tower number 2?

24 A. Yes.

25 Q. If we could actually go back to the second page

1 of Exhibit 19.02, please. Focus on this section.

2 Do you see the section that says number 1 quench?

3 A. In the middle. Number 1 quench as well as

4 number 2 use once through water only.

5 Q. Why don't you tell the jury what that means.

6 A. It means the water that's -- that's used to

7 deluge the coke to cool this coke off is a

8 once-through only water before it's discharged

9 through their SPDES permit. As this water goes

10 through this coke, it collects particulates and

11 other organics. It's dirty. If you reuse it, you

12 re-entrain some of the contaminants collected by

13 that water.

14 Q. Okay. You said SPDES permit. I don't think

15 we've covered that yet. Why don't you tell the

16 jury what a SPDES permit is.

17 A. SPDES permit is a division of water permit for

18 any outfall to a water body.

19 Q. Okay. If I could show you for identification

20 purposes Exhibit 129, but simultaneously, your

21 Honor, move this into evidence as an Air 100 which

22 has different contaminants listed on it that are

23 relevant to the Title V permit.

24 THE COURT: Mr. Linsin?

25 MR. LINSIN: Your Honor, what year are we

1 talking here?

2 THE COURT: 1983 I think.

3 MR. LINSIN: This is a SPDES permit for
4 which unit, which source?

5 MR. MANGO: Your Honor, this is an Air 100
6 for stack two dated 9/20/83.

7 MR. LINSIN: For stack two?

8 MR. MANGO: Well, this is -- your Honor,
9 I'm going to use this to establish that Tonawanda
10 Coke needed a Title V permit. There's nothing --

11 MR. LINSIN: No objection.

12 THE COURT: Okay. Mr. Personius?

13 MR. PERSONIUS: No objection, Judge.

14 THE COURT: Okay. 129 received.

15 MR. MANGO: Thank you.

16 THE COURT: And can be published.

17 MR. MANGO: Thank you, your Honor.

18 (Government's Exhibit 129 was received
19 into evidence.)

20 BY MR. MANGO:

21 Q. Okay. Lets -- if we could just -- you've --
22 where did this document come from?

23 A. The DEC files in Region 9.

24 Q. Now, is there a section in here that talks
25 about contaminants?

1 A. Yes, right in the middle.

2 Q. Okay. And if there's not enough room for the
3 contaminants that are listed, what happens? How
4 does additional contaminants get added to the Air
5 100?

6 A. We cut out a part of the application and staple
7 it on.

8 Q. Okay. If we can go to the second page of
9 Exhibit 129, please. If we can focus in on that,
10 this whole thing.

11 Do you see for nitrogen oxide listed there?

12 A. Yes.

13 Q. Okay. There is some contaminants listed. Why
14 don't you tell just in terms of -- there is a
15 column at the end here, says "pounds per year", is
16 that right?

17 A. Correct.

18 Q. Okay. Is this something that the DEC would use
19 in evaluating whether -- let's jump ahead now to
20 19 -- late '90s when you said you started
21 implementing Title V -- that DEC would use to
22 determine if Tonawanda Coke needed a Title V
23 permit?

24 A. Yes. This would be the data that's in our
25 inventory, and from here you can see that 4.599

1 times ten to the fifth pounds per year is somewhere
2 about 250 tons per year, which qualifies as a
3 Title V facility.

4 Q. And that's what you had already testified if
5 there was 100 or more tons a year of pollutants?

6 A. Correct.

7 Q. So this is a document that, would it be fair to
8 say, is subsequently used later when you're
9 implementing Title V?

10 A. Correct. This would be part of the inventory.

11 THE COURT: All right. Tap that part of
12 the exhibit that references more than 100 pounds.

13 BY MR. MANGO:

14 Q. If you could just tap. Okay. So that says
15 4.599. Why don't you tell the Court what you're
16 looking at.

17 A. The units are pounds per year. You know, the
18 first set of numbers are 4.599 to the power of 10
19 to the fifth pounds per year. So have to divide
20 that by 2,000 pounds per ton to get tons.

21 Q. Okay.

22 THE COURT: Frankly I didn't understand
23 one word you said. Try it again.

24 THE WITNESS: It's over 100 tons a year.
25 Qualified --

1 THE COURT: I know the conclusion, but
2 explain how you got to that. By doing what? You
3 take the number 4.599 --

4 THE WITNESS: It's the power of tenth to
5 the fifth, so actually take that decimal point and
6 move it over five numerals, and that's exactly how
7 many pounds per year it is.

8 THE COURT: So you move it over five
9 numerals to the right, right?

10 THE WITNESS: And divide that by 2,000.
11 There's 2,000 pounds in a ton, will give you tons
12 per year.

13 THE COURT: Okay.

14 THE WITNESS: Who's got their calculator
15 if you want an exact number.

16 THE COURT: That probably made sense the
17 first time, but it makes more sense this time.
18 Thank you.

19 MR. MANGO: Okay. I'd now like to show you
20 for identification purposes Government Exhibit 110
21 and absent an objection, your Honor, I'd offer this
22 into evidence as it discusses quench tower number
23 1.

24 THE COURT: Okay. What year are we
25 talking about? You said 110?

1 MR. MANGO: Yes, Government Exhibit 110.

2 THE COURT: Okay. Any objection?

3 MR. LINSIN: No, your Honor.

4 THE COURT: Okay. 110 received.

5 THE CLERK: Mr. Personius, Judge?

6 THE COURT: I'm sorry?

7 THE CLERK: Mr. Personius didn't answer.

8 THE COURT: Yeah, Mr. Personius, no

9 objection?

10 MR. PERSONIUS: Forgive me, Judge, I'm
11 finishing reading it.

12 No objection, Judge.

13 THE COURT: Okay. 110 received, and it
14 may be published.

15 (Government's Exhibit 110 was received
16 into evidence.)

17 BY MR. MANGO:

18 Q. Great. Mr. Carlacci, can you please just
19 explain what this document is and the date, who
20 it's from and to.

21 A. It's an internal memo from Gary Foersch, an
22 employee of DEC in 1984, to his -- to Henry
23 Sandonato, an employee of DEC in 1984, discussing
24 emissions from the waste heat stack for sulfur
25 dioxide.

1 Q. Okay. Who was Henry Sandonato at the time this
2 would have been created in '84?

3 A. Henry Sandonato was engineer 2 at the time.

4 Q. And who was Gary Foersch at the time this was
5 created?

6 A. Gary Foersch was a technician in Division of
7 Air.

8 Q. So based on this, is it fair to say that Henry
9 Sandonato supervised Gary Foersch?

10 A. Yes.

11 Q. Let's focus in, if we can zoom on this last
12 paragraph.

13 What does that say?

14 A. "The scheduled usage of the number 1 quench
15 tower (standby tower) was also discussed. The only
16 scheduled usage is during the winter months and
17 only to prevent freeze ups. They would amount to
18 approximately 5 percent of the time. The only
19 other usage would be in an emergency when the
20 number 2 quench tower cannot be used. This would
21 amount to approximately another 5 percent of the
22 time."

23 Q. Okay. We had previously looked at that Air 100
24 that talked about a 10 percent -- the tower could
25 not be used more than 10 percent of the time.

1 A. Correct.

2 Q. This is an internal memo documenting some
3 observations by Mr. Foersch?

4 A. A conversation between -- it appears between
5 Mark and Gary.

6 MR. MANGO: Your Honor, I would at this
7 point now move on to -- Mr. Carlacci, I'd like to
8 show you Government Exhibit 19.17 for
9 identification purposes, and absent an objection, I
10 would move this into evidence as it relates to
11 quench tower number 1.

12 MR. LINSIN: No objection.

13 MR. PERSONIUS: No objection, your Honor.

14 THE COURT: Okay. 19.17 received, no
15 objection.

16 (Government's Exhibit 19.17 was received
17 into evidence.)

18 THE COURT: It may be published.

19 BY MR. MANGO:

20 Q. Okay. Just, if we could focus on that section
21 please. If you could just tell the jury, just in
22 general -- we don't need to read this whole
23 letter -- what -- what is the essence of this
24 letter?

25 A. It allows for -- for the exemption of the

1 installation of the baffles in the number 1 quench
2 tower approved by the department.

3 Q. And second to last paragraph it says, "If at a
4 future date any of the justifications in your
5 September 19th letter are no longer valid, then
6 compliance may be required", is that right?

7 A. Correct.

8 Q. Okay. So, this is an official letter from DEC
9 to Defendant Kamholz saying you have an exemption
10 for no baffles or to not have baffles in quench
11 one?

12 A. Correct.

13 THE COURT: And that's for purposes of the
14 permit requirements for Air 100?

15 THE WITNESS: Yes. The ability of that
16 Part 214 requirement on that quench tower.

17 MR. MANGO: Your Honor, I'd like to move
18 to Government's Exhibit 19.21.

19 BY MR. MANGO:

20 Q. And, Mr. Carlacci, I'd like to show you that
21 for identification purposes. If we can just focus
22 on this section here. What is the date of this?

23 A. Dated October 22nd, 1984.

24 Q. And it's from who to who?

25 A. A letter from Gary Foersch to Mr. Crane.

1 Q. Okay. And what --

2 A. Informing them of an inspection by the
3 department and United States Environmental
4 Protection Agency.

5 Q. Is this a document that was sent by DEC?

6 A. Yes.

7 Q. It's a document maintained in the DEC file in
8 the regular course of business?

9 THE COURT: All right, no objection --

10 MR. LINSIN: No objection.

11 THE COURT: So we could probably
12 dispense --

13 MR. PERSONIUS: No.

14 MR. MANGO: We'll move this into evidence,
15 your Honor, 19.21.

16 THE COURT: Okay. Received. It may be
17 published, and already done.

18 (Government's Exhibit 19.21 was received
19 into evidence.)

20 BY MR. MANGO:

21 Q. Great. So this -- in essence, if you could
22 read the middle sections there.

23 A. "Sources to be inspected are the coke oven
24 battery, boiler house, and the by-products plant."

25 Q. Okay. So this is basically giving notice that

1 there's an inspection that is going to happen and
2 we want to learn about the by-products?

3 A. Yes.

4 MR. MANGO: Okay. If we can move to --
5 I'd like to show you for identification purposes
6 Government Exhibit 19.05, and absent an objection
7 and move this into evidence, as it is a letter from
8 DEC to Defendant Kamholz.

9 MR. PERSONIUS: No objection, Judge.

10 MR. LINSIN: No objection, your Honor.

11 THE COURT: Okay. 19.05 received, no
12 objection. Publish please.

13 (Government's Exhibit 19.05 was received
14 into evidence.)

15 BY MR. MANGO:

16 Q. If we can focus on that section please, Lauren.

17 Okay. Now who is this a letter from and who is
18 it to and when is it dated?

19 A. This is a letter from Gary Foersch to
20 Mr. Kamholz dated November 21st, 1984.

21 Q. And in this letter is there a request being
22 made by Mr. Foersch?

23 A. Yes.

24 Q. What is the request for?

25 A. For a flow diagram of the by-products plant.

1 Q. Okay. And the purpose of that -- what is --
2 what is the purpose that Mr. Foersch or the
3 department would be asking for a by-products flow
4 diagram?

5 A. Looking for sources of emission.

6 MR. MANGO: All right. If we can move on,
7 I'd like to show you Government Exhibit 19.06, and
8 absent an objection -- for identification purposes,
9 and absent an objection, your Honor, I would move
10 this into evidence as it is a response from
11 Tonawanda Coke Corporation to what we just looked
12 at.

13 MR. PERSONIUS: I don't object, Judge.
14 I'm wondering is there more to this exhibit than
15 just the one page?

16 MR. MANGO: There is. It's a two-page
17 exhibit, your Honor.

18 MR. PERSONIUS: Okay. No objection,
19 Judge.

20 MR. LINSIN: Could we just see the second
21 page of the exhibit?

22 THE COURT: Sure. Sure.

23 MR. LINSIN: No objection.

24 THE COURT: Okay. No objection, 19.06
25 received and may be published.

1 (Government's Exhibit 19.06 was received
2 into evidence.)

3 MR. MANGO: Thank you, your Honor. If we
4 can focus on this section, please.

5 BY MR. MANGO:

6 Q. What is this letter -- what is the purpose of
7 this letter?

8 A. This is a response to the previous letter from
9 Mark Kamholz to Gary Foersch, including a process
10 diagram of the by-products area.

11 Q. If we could go to the second page, please. And
12 what is this -- is this an attached flow diagram
13 that was with this letter?

14 A. It appears to be, yes.

15 Q. If there is a way -- yes, thank you.

16 Again, we've been talking about this pressure
17 release valve. Have you also heard this pressure
18 release valve known as a bleeder that we'll talk
19 about in a minute?

20 A. I know of a bleeder valve.

21 Q. Yes. Do you see the bleeder valve on here?

22 A. I do not see one labeled there.

23 THE COURT: Is a pressure relief valve and
24 bleeder the same thing for purposes of what you do?

25 THE WITNESS: Yes.

1 THE COURT: And with respect to Tonawanda
2 Coke, same thing?

3 THE WITNESS: There's slight differences.
4 A bleeder valve gives you the impression that it's
5 used regularly to bleed off gas versus a pressure
6 relief valve is something that's to maintain
7 pressure in a system that normally is not used to
8 bleed off gas.

9 THE COURT: So are the terms
10 interchangeable?

11 THE WITNESS: It can be.

12 THE COURT: They cannot be as well?

13 THE WITNESS: Correct.

14 THE COURT: Okay.

15 MR. MANGO: I'd like to follow-up with
16 that. Have you ever heard of the term "bleeder
17 valve" absent what you've come to learn that is at
18 the -- was at the Tonawanda Coke Corporation?

19 THE WITNESS: Probably in the refinery
20 industry when it was here back in the '80s. I
21 can't say positively it was used at Ashland
22 Refinery or Mobile Refinery, but it's terms that
23 you would hear at that those types of facilities.

24 MR. MANGO: Okay.

25 THE COURT: All right. Go ahead. Are you

1 leaving this exhibit or staying with this one?

2 MR. MANGO: I was going to leave, your
3 Honor. I don't know if, your Honor --

4 THE COURT: We're going to leave I think
5 for the day. But I want to know, if you take a
6 look at that chart, at least from where I'm
7 stating, it says weak liquor storage.

8 MR. MANGO: Yes.

9 THE COURT: Okay.

10 MR. MANGO: If we're going to end now,
11 your Honor, we can do it during the next --

12 THE COURT: With weak liquor. Okay. Lets
13 end it there, okay? I think we made some progress.
14 We're going to move through this. Bear with us.
15 It takes a little bit of work, but we're going to
16 do it.

17 Thank you for your attention. You've been
18 great. I hope it was an okay day for you. We'll
19 see you tomorrow. We're going to try to start
20 again as close to what time?

21 THE JURY: 9:30.

22 THE COURT: 9:30. Did somebody say 10:30?
23 We're going to try for 9:30. Be safe on your
24 return home. Leave in plenty of time to get here.
25 Be safe, and we'll see you tomorrow. Don't discuss

1 the case, don't research it, don't stop anywhere,
2 and we'll resume again as close to 9:30 as we can.
3 Thank you very much. Leave your books behind,
4 please.

5 (Jury excused from the courtroom.)

6 THE COURT: Okay. Mr. Carlacci, you may
7 step down. We'll see you tomorrow morning.

8 THE WITNESS: Thank you.

9 THE COURT: All right. Thank you very
10 much, everybody. We'll see you just before 9:30.

11 MR. PERSONIUS: Judge, can I raise one
12 point?

13 THE COURT: Sure.

14 MR. PERSONIUS: And I don't know if this
15 is a matter of concern or not, but we've now had
16 two different diagrams that this witness has
17 testified about, and each time the witness has been
18 asked if it shows a PRV. And it's known the PRV
19 wasn't installed at the time that either of these
20 diagrams were prepared. So I don't think it's
21 being done necessarily intentionally to mislead,
22 but I think to ask that question knowing that the
23 PRV wasn't in place at that time has a tendency to
24 mislead the jury.

25 THE COURT: Go ahead.

1 MR. MANGO: If I can respond, your Honor.
2 The government was never informed when this was
3 installed. This is coming from defense exhibits
4 that are -- so there's nothing that the government
5 has that affirmatively says when it was installed,
6 but --

7 MR. PERSONIUS: The government does have a
8 defense exhibit that indicates that it was -- there
9 is a folder for what's called an emergency flare
10 from 1987. And that's our understanding of when
11 the valve was installed.

12 THE COURT: All right. I mean -- go
13 ahead.

14 MR. MANGO: The other point, your Honor,
15 that obviously the government is making here is
16 that these were by-product flow diagrams that
17 Mr. Kamholz sent to the DEC, and that regardless,
18 I'm going to make the case on good faith here that
19 there's no by-products flow diagram that has the
20 pressure release valve after it was put in. And
21 I've got to obviously go through that.

22 THE COURT: I'm going to let you do it. I
23 don't find that it's necessarily misleading, and
24 you can make of it what you want to make of it.

25 MR. PERSONIUS: Okay.

1 THE COURT: At this point. All right.

2 Thank you.

3 MR. MANGO: Thank you, your Honor.

4 MR. LINSIN: Thank you, your Honor.

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CERTIFICATION

I certify that the foregoing is a
Correct transcription of the proceedings
Recorded by me in this matter.

s/Michelle L. McLaughlin
Michelle L. McLaughlin, RPR
Official Reporter
U.S.D.C., W.D.N.Y.